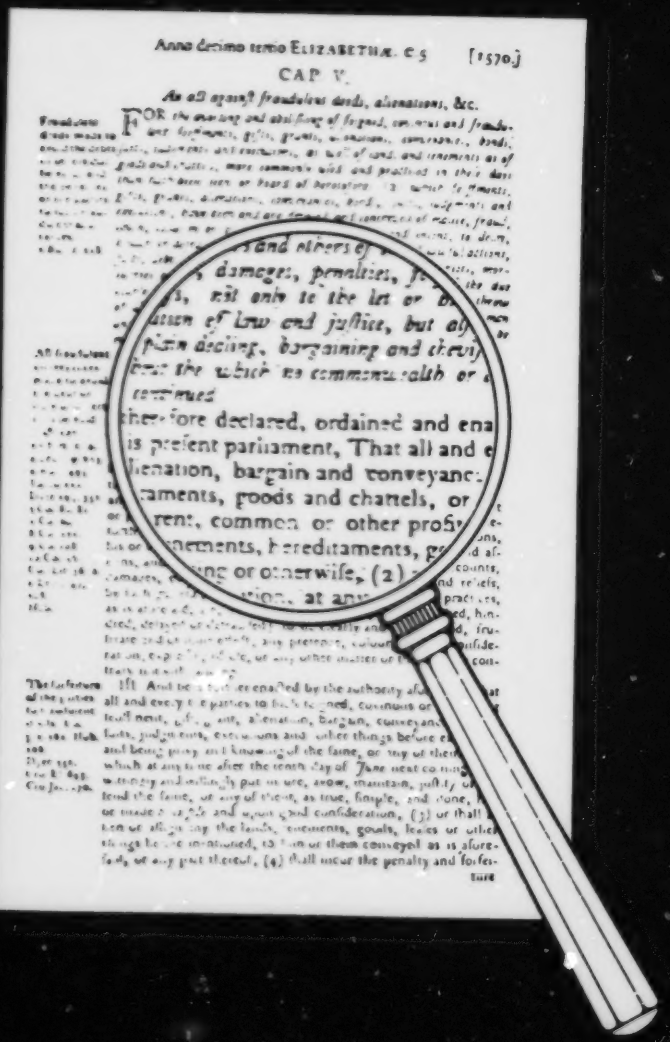
Tentative Proposals For A New Personal Property Security Act

Saskatchewan



TENTATIVE PROPOSALS FOR A NEW PERSONAL PROPERTY SECURITY ACT

Law Reform Commission of Saskatchewan

Saskatoon, Saskatchewan

December, 1990

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The Law Reform Commission of Saskatchewan was established by ***An Act to Establish a Law Reform Commission*** proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Mr. Dale G. Linn, B.A., LL.B., Chairman

Madam Justice Marjorie A. Gerwing

Mr. Gordon J. Kuski, Q.C.

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Professor Ronald C.C. Cuming, Q.C. of the College of Law, University of Saskatchewan, is the Consultant to the Commission on *The Personal Property Security Act.*

* * * * * * * * * * * * * * * *

The Law Reform Commission Act

> 6. The Commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law....

Note

These proposals have been approved by the Commission for the purposes of discussion. They are designed to bring the Saskatchewan legislation in line with *The Personal Property Security Acts* of British Columbia and Alberta.

It is the policy of the Commission to seek response to its proposals before a final report is prepared for presentation to the Minister of Justice. Accordingly, the Commission invites comments and criticisms from the Bench and Bar and others interested in this particular area of law.

Submissions should be directed to:

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TENTATIVE PROPOSALS FOR A NEW PERSONAL PROPERTY SECURITY ACT

I. BACKGROUND

In February, 1976, the Law Reform Commission of Saskatchewan issued "Tentative Proposals for a Saskatchewan Personal Property Security Act". This was followed in July, 1977 by "Proposals for a Saskatchewan Personal Property Security Act". These reports led ultimately to the enactment of the Saskatchewan Personal Property Security Act in 1980, to come into effect May 1, 1981. (Now see R.S.S. 1978, c. P-6.1.) While not in a form identical to that proposed by the Commission, the Act contains all of the features and most of the drafting style of that contained in the 1977 proposals.

The Personal Property Security Act has been in operation for over seven years. It has generally worked well. From the beginning, Saskatchewan courts took the position that the Act represented an entirely new approach to the regulation of personal property security transactions. When interpreting its provisions, they kept in mind the underlying policy of the legislation which is to modernize this area of the law so as to bring it more in line with the needs of the person whose rights are affected by it.

While The Saskatchewan Personal Property Security Act was not the first of its kind in Canada, it did introduce into Canadian law a number of innovations.[1] Most of these innovations were incorporated in the Uniform Personal Property Security Act, 1982, prepared by the Uniform Law Conference of Canada and in the recently enacted Ontario Personal Property Security Act. In addition, the Saskatchewan Act served as a model for the basic structure of the Alberta and British Columbia Personal Property Security Acts.

The apparent success of The Personal Property Security Act does not mean that improvements cannot be made. Clearly the basic concepts and structures of the Act are as sound now as they were when it was enacted over seven years ago. However, the Commission is convinced that the time has come to re-examine the Act in the light of events that have occurred since the legislation was first enacted. Indeed, it is proposed in this report that the Act be repealed and replaced with a new Act that differs in many minor respects from the current Act. Several factors led the Commission to conclude that a new Act is warranted. Each of these factors is briefly discussed in the next section of this report. It is obvious that, by themselves, several of these factors are not sufficiently important to have induced the Commission to recommend a new Act rather than amendments to the existing Act.

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[1] For a comparison of The Saskatchewan Personal Property Security Act with the former Ontario Personal Property Act and the current Manitoba Personal Property Security Act, see R.C.C. Cuming, "Second Generation Personal Property Security Legislation in Canada" (1981-82) 46 Sask. Law Rev. 5.

However, there is one factor, harmonization of the personal property security law of Western Canada, that dictates this approach.

II. FACTORS UNDERLYING PROPOSALS FOR A NEW PERSONAL PROPERTY SECURITY ACT.

1. Oversight on the Part of the Drafters of the Act.

The Personal Property Security Act is a very complex and multi-faceted piece of legislation. It introduced concepts and approaches all of which were novel to Saskatchewan law and some of which had no precedents anywhere. Not only did the Act reform the basic law of personal property security transactions, but it had an important effect on a number of other provincial statutes. All this being the case, one might expect that matters would be overlooked by the drafters of the Act. In addition, other matters that were not overlooked were not correctly or adequately addressed in the legislation. In other words, experience with the Act over the last seven years points to the need for a considerable amount of "fine tuning" of the legislation.

2. Innovation in Computer Hardware and Software

In the world of computer hardware and software, seven years is a very long time. While the software designed for the Personal Property Registry was originally "state of the art", developments over the last seven years have induced the Commission to look at some major changes in the approach to the Registry. This is not to say that the Registry software has remained unaltered or unimproved over the last seven years. Many improvements have been made. However, the innovations discussed in this report are of a type that, to implement them, will necessitate a change not only in the Registry software but as well in provisions of the Act and the Regulations.

3. Judicial Construction Inconsistent with Underlying Policies of The Personal Property Security Act

As noted above, it is the opinion of the Commission that generally Saskatchewan courts have sought to implement the policies of the Act. The approach used has been very constructive and reflective of a desire to ensure that legal doctrines and approaches displaced by the Act are not reintroduced through judicial interpretation of its provisions. However, in the opinion of the Commission, Saskatchewan courts have misconstrued a few, but important, features of the Act thereby limiting the effectiveness of the legislation. A new Act would clarify aspects of the underlying policies of the Act so as to ensure that vagueness in the drafting of the legislation does not mislead the courts with respect to these features of it.

4. Harmonization of the Personal Property Security Law of Western Canadian Jurisdictions

In 1985 representatives from the governments of Alberta, British Columbia, Saskatchewan and Manitoba convened in Edmonton to explore the possibilities of co-ordinated action in the formulation of reformed personal property legislation in all jurisdictions in Western Canada. As a result of this meeting, the Western Canada Personal Property Security Act Committee was formed.[2] The Committee has held annual meetings since its formation.

At the 1989 meeting of the Committee, formal approval was given to a model Western Canada Personal Property Act, (hereinafter referred to as the WCPPSA). The Act was slightly modified at the 1990 meeting. The WCPPSA has been designed to serve as a vehicle for securing substantially uniform Personal Property Security Acts in Alberta, British Columbia, Manitoba, Northwest Territories, Saskatchewan and the Yukon.

In 1988 the Alberta Legislature enacted a Personal Property Security Act substantially modelled on a 1988 draft of the WCPPSA. However,this legislation was not designed to come into effect without minor modifications. In 1990, amendments were enacted to reflect the 1990 changes to the model Act. The Act came into force on October 1, 1990.

The British Columbia Legislature enacted the British Columbia Personal Property Security Act in the spring of 1989. This Act was patterned very closely on the 1989 WCPPSA. As with the Alberta Act, some further minor changes were made to this legislation in 1990 to bring it in line with the Alberta Act and the model Act. The British Columbia Act came into force on October 1, 1990.

The Attorney General for Manitoba has stated that he is interested in repealing the existing Manitoba Personal Property Security Act and replacing it with legislation that will bring the personal property security laws of Manitoba more in line with equivalent laws in other Western Canadian jurisdictions.

It is the opinion of the Commission that Saskatchewan residents will gain benefits from having a Saskatchewan Personal Property Security Act that is very similar to the Personal Property Security Acts of other Western Canadian provinces and territories. One of the most obvious benefits is simplification of secured financing of the business activities of debtors which have assets in several jurisdictions in Western Canada including Saskatchewan. While it is unlikely that uniformity will ever eliminate the need to retain indigenous legal advice, it will

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[2] The Committee was the product of exasperation experienced by those who had worked under the auspices of the Canadian Bar Association and the Uniform Law Conference of Canada to secure harmonization of personal property security law among all the common law jurisdictions of Canada. It was clear at that time that Ontario was not particularly interested in harmonization and was determined to go its own way and to pay little regard to developments in this area of the law elsewhere in Canada. The result is that the recently enacted Ontario Personal Property Security Act is different in many minor respects and in a few major respects from its counterparts in Alberta and British Columbia.

reduce the difficulty associated with fashioning secured lending transactions to meet the separate requirements of several jurisdictions. It will also reduce the incidence of "legal traps" produced by peculiar registration requirements or unusual priority rules of "foreign" law.

Interjurisdictional uniformity of law has another important benefit. It hastens the process of judicial clarification of the area of the law involved. In other words, when the same or substantially the same legislation exists in several jurisdictions, judicial interpretation of provisions of the legislation rendered in one jurisdiction is likely to be influential in the other jurisdiction. In this way ambiguities in the legislation are removed much more rapidly than would be the case where the courts of a single jurisdiction must be relied upon to remove the ambiguities.

Another feature of a co-ordinated approach to development of this area of the law is the opportunity for sharing costs of the developments. It is obvious that the neighbouring provinces have benefitted a great deal from the pioneering efforts undertaken in Saskatchewan in this area. Should one or more of these jurisdictions decide to take over temporarily the role that until recently Saskatchewan played in this respect, it would be to the advantage of Saskatchewan residents to be in a position to take advantage of some of the knowledge obtained at the cost of taxpayers of other provinces. At the very least, it would be beneficial to be able to participate in joint development activities with other jurisdictions having very similar systems for the regulation of personal property security transactions.

III. THE APPROACH TO REFORM: A NEW PERSONAL PROPERTY SECURITY ACT

As indicated earlier in this report, the Commission has concluded that the best way to address the need for further reform in the area of personal property security law is to repeal the existing Personal Property Security Act and to replace it with a new Act patterned substantially on the WCPPSA. This conclusion was induced by the realization that, while there are few, if any, conceptual differences between the existing Act and the 1989 WCPPSA, there is a large number of small differences. It would require a correspondingly large number of amendments to the existing Act in order to bring it in line with 1989 WCPPSA and the Acts of Alberta and British Columbia. When complex legislation is amended, there is always potential for confusion and oversight on the part of practitioners and judges. The enactment of a new Act provides a highly visible signal that the law has been changed. Proceeding by way of amendments to the existing Act would not avoid having to address the problem of rationalization of rights acquired under the existing Act and rights acquired under the reformed legislation.

The Commission has not overlooked the fact that a great deal of very valuable case law has been developed around the wording of the existing Act. However, since much of this case law was extant at the time the WCPPSA was being prepared, and since many of the key provisions of the model Act were based on the

existing Saskatchewan Act, little of this case law will be lost. Of course, some of this case law will be intentionally reversed or modified by the new Act.

IV. THE RECOMMENDED NEW PERSONAL PROPERTY SECURITY ACT

The balance of this report contains the existing Personal Property Security Act with each provision underlined, the corresponding provision of the proposed new Act and a short commentary indicating the reasons for any differences between the two.

THE PERSONAL PROPERTY SECURITY ACT

SHORT TITLE

(existing and proposed Act)

1 This Act may be cited as The Personal Property Security Act.

INTERPRETATION

2 (1) In this Act,

(existing Act)

(a) "accessions" or "accession goods" means goods that are installed in or affixed to other goods in such a manner or under such circumstances as to result in their becoming in law an accession to the other goods and, in relation to accession goods:

(i) "other goods" means goods to which accession goods are affixed or attached; and

(ii) "the whole" means the accession goods and the other goods;

* * *

(proposed Act)

(a) "accessions" means goods that are installed in or affixed to other goods;

COMMENT

It will be noted that the definition of the term accession has been significantly changed in the proposed Act. Under the existing Act, the term is in reality not defined. The purpose of existing section 2(a) is to make it clear that the common law concepts of accession are imported into the Act. In other words, the tests of the common law are to be used when determining whether or not goods have become attached to other goods in such a way that they are to be treated in law as part of the goods to which they are attached. By contrast the definition of the term in the proposed Act is in reality a definition. In other words it provides a test for determining when goods are to be treated as part of the goods to which they are attached. This occurs when they are installed or affixed to other goods.

There are two reasons for the change in approach reflected in the definition contained in the proposed Act. The first is the uncertainty as to what is the appropriate test at common law. This uncertainty is reflected in the following excerpt from Crossley Vaines on Personal Property, 5th ed. at page 432:

> To this and similar problems (which have been strangely neglected in the English courts) a more precise answer may be found in the many Commonwealth and American decisions dealing with accession in relation to motor vehicles. The right of accession gives the property in the whole to the owner of the principal chattel, which is probably that which is the greater value, and the degree of annexation sufficient to constitute an accession may be decided in the light of various tests: (1) that of severability or "injurious removal"--can there be a separation of the original chattels without destroying or seriously injuring the whole?; (2) that of "separate existence"--has the incorporated chattel ceased to exist as a separate chattel?; (3) would the removal of the incorporated chattel destroy the utility of the principal chattel? Yet another test has been suggested as one particularly suited to English law because of its flexibility and by virtue of its association with realty, namely the test of the degree and purpose of annexation.

It can be seen that the tests set out in this passage are not compatible and their application can produce different results. In this regard see, Industrial Acceptance Corp. Ltd. v. Firestone Tire & Rubber Co. of Canada Ltd. [1971] S.C.R. 357.

The second reason for including a statutory test of accession is that under the more popular common law test, the so-called "injurious removal test" (see Ilford Riverton Airways Ltd v. Aero Trades (Western) Ltd. (1977), 76 D.L.R. 742 (Man. C.A.)), very few things can be accessions with the result that section 37 has little significance. This point is made by Professor Goode in Hire Purchase Law and Practice at page 750:

> What is regarded as capable of removal without material injury will change in the light of technological advance; and techniques for replacing components have now developed to the point where compelling evidence will be required if the court is to be persuaded to treat the added chattel as having passed by accession..... Hence in disputes concerning cars and lorries--the principal source of battles over accession--the following have been held to be readily removable without material damage and thus not to pass as accessions, namely tyres, tyre casings and inner tubes, engines, batteries, connecting rod bearings, heaters, a detachable truck bed removable from the chassis and motorbus bodies attached to trucks. Indeed if one excluded the minority decision in which tyres have been to pass as accessions, there are very few reported cases in which a claim based on accession has succeeded.

Section 37 provides a set of priority rules designed to regulate the relative rights of a person holding a security interest in an item of goods that is attached to other goods, and a person who has or acquires rights in the combination of goods. There is little point in having such a scheme in the Act and at the same time having a test of accession that excludes most commercially important situations of the kind contemplated by this scheme from the scope of the Act through the definition of the term accession.

The proposed Act will continue to draw a distinction between "other goods" and "the whole". However, since these terms are used only in section 38 of the proposed Act, as a matter of good drafting, the definition of these terms has been moved to section 38.

The definition of the term "accession" in the proposed Act is very skeletal. It implies aspects of the common law approach to accessions. It is still necessary to identify which item is the accession and which is the principal chattel (the "other goods").

Endemic to the changes in the law that would be affected by the proposed Act is the potential problem of conflict and legal confusion arising from the necessity to recognize, after the proposed Act becomes law, rights arising under the existing Act or under existing common law rules. Fortunately, the problem appears to be of little significance in the context of accessions. As noted above, section 37 of the existing Act has a very narrow scope since very few items of commercial significance are accessions. This will not be the case under the more inclusive approach contained in the new definition. Under the current Act, a security interest in an item, which would be treated in law as an accession after the proposed Act comes into force, would be separately perfected by registration of a financing statement. However, the change in characterization of the item under the new Act will not place this security interest in jeopardy. In other words, the effect of section 38 is to permit a security interest in an accession to be taken and separately perfected. In the result, the fact that the item becomes an accession makes no change in the perfected status of the security interest in the accession. What it does do, however, is to provide a regulatory structure to deal with the enforcement of the security interest against the accession. This structure is not available under existing law. The application of this regime to security interests in goods that are attached or affixed to other goods can only be beneficial.

This is not to suggest that, under section 38 of the proposed Act, the priority position of the holder of a security interest in the accession will not be affected should the security interest not be perfected. There is no doubt that it will. For example, under section 38, a person who takes a security interest in the whole (the accession goods and the goods to which they are attached) takes free from an unperfected security interest in the accession even though at common law the seller did not have an interest in the attached goods. Under existing law, the principle of nemo dat quod non habet would give priority to the holder of the security interest in the attached goods since the title to these goods would not vest in the seller by operation of law. Under section 38(3) of the proposed Act, a

person who takes an interest in the whole has priority over an unperfected security interest in the accession and a plea of nemo dat quod non habet would be of no avail to the holder of the security interest. It is the opinion of the Commission, however, that this change in the law will not be disruptive.

(existing and proposed Act)

(b) "account" means any monetary obligation not evidenced by chattel paper, an instrument or a security , whether or not it has been earned by performance:

COMMENT

There is no change in this definition.

(existing Act)

The term "advance" is not defined in the existing Act

* * *

(proposed Act)

(c) "advance" means the payment of money, the provision of credit or the giving of value and includes any liability of the debtor to pay interest, credit costs and other charges or costs payable by the debtor in connection with an advance or the enforcement of a security interest securing the advance;

COMMENT

This definition has been derived from the definition of "future advance" in the existing Act. Under the proposed Act, the terms "advance" and "future advance" are separately defined. The term "advance" includes "future advance" but not all "advances" are "future advances".

This change was thought to be a desirable as a "housekeeping" measure. Both section 20(2) and its counterpart in the proposed Act, section 35(6), refer to "advances" whereas sections 14 and 35(4) of the existing Act and their

counterparts in the proposed Act, sections 14 and 35(5), refer to "future advances".

The reference in the definition to interest, credit costs and charges payable by the debtor is designed to remove any doubt that these items are advances referred to in section 35(5).

(existing Act)

(c) "building" includes a structure, erection, mine or work built, erected or constructed on or in land;

* * *

(proposed Act)

(d) "building" means a structure, erection, mine or work built, constructed or opened on or in land;

COMMENT

There is no change in this definition.

(existing Act)

(d) "building materials" includes goods that are or become so incorporated or built into a building so that their removal would necessarily involve the removal or destruction of some other part of the building and thereby cause substantial damage to the building, apart from the value of the goods removed, but does not include:

(i) goods that are severable from the building or land merely by unscrewing, unbelting, unclamping or uncoupling, or by some other method of disconnection; or

(ii) machinery installed in a building for use in carrying on an activity where the only substantial damage, apart from the value of the machinery removed, that would necessarily be caused to the building in removing the machinery therefrom is that arising from the removal or destruction of the bed or casing

on or in which the machinery is set and the making or enlargement of an opening in the walls of the building sufficient for the removal of the machinery;

* * *

(proposed Act)

(e) "building materials" means materials that are incorporated or built into a building and includes goods attached to a building so that their removal

(i) would necessarily involve the dislocation or destruction of some other part of the building and cause substantial damage to the building, apart from the loss of value of the building resulting from the removal, or

(ii) would result in weakening the structure of the building or exposing the building to weather damage or deterioration,

but does not include

(iii) heating, air conditioning or conveyancing devices, or

(iv) machinery installed in a building or on land for use in carrying on an activity in the building or on the land;

COMMENT

The definition of "building materials" in the existing Act differs in several respects from the definition of the term in the proposed Act. However, all of the differences are a result of efforts to clarify the definition. They do not represent a difference in approach or policy.

The major difference between the two is that the definition in the proposed Act adds an additional test: would removal result in weakening of the structure of the building or the exposure of the building to weather damage or deterioration? Under the definition in the existing Act, an argument can be made that items such as windows, window frames, external door frames, siding, etc., which are generally considered to be an integral part of a building, and therefore, building materials, are severable from the building by unscrewing or some other method of disconnection without destruction of some other part of the building.

This is a product of modern construction techniques. While in general there is no good reason why separate security interests in some of these types of goods should not be recognized, it was thought that the Act should not encourage or facilitate the separate financing of items, the removal of which would result in weakening of the structure of the building or exposing it to weather damage or deterioration. This policy is nothing more than an amplification of the "substantial damage" test of the existing definition.

Unlike the definition in the existing Act, the definition in the proposed Act makes it clear that heating, air conditioning and conveyancing devices are not building materials. It also excludes machinery, however attached, that has been installed for use in carrying on an activity in the building.

It is the view of the Commission that the changes contained in this definition are not such as to warrant special measures to protect rights arising under the existing Act. To the extent that the definition in the proposed Act is broader, it excludes from the operation of section 36 a broader range of goods. However, as a practical matter, it is very unlikely that any secured party will be prejudiced since there is no evidence to indicate to the Commission that secured parties rely on items such as external window frames, door frames and siding as collateral under the existing Act.

(existing and [proposed Act])

(e)[(f)] "chattel paper" means one or more writings that evidence both a monetary obligation and a security interest in or lease of specific goods or a security interest in specific goods and accessions, but does not include a security agreement providing for a security interest in specific goods and after-acquired goods other than accessions;

COMMENT

There is no change in this definition.

(existing and [proposed Act])

(f)[(g)] "collateral" means personal property that is subject to a security interest;

COMMENT

There is no change in this definition

(existing Act)

(g) "consignment" means an agreement under which goods are delivered to a person, who in the ordinary course of business deals in goods of that description, for sale, resale or lease, by a person who:

(i) in the ordinary course of business deals in goods of that description; and

(ii) reserves a proprietary interest in the goods after they have been delivered;

but does not include an agreement under which goods are delivered to a person for sale or lease if the person is generally known in the area in which he carries on business to be selling or leasing goods of others.

* * *

(proposed Act)

(h) "commercial consignment" means a consignment under which goods are delivered to a consignee for sale, lease, or other disposition to a consignee, who, in the ordinary course of the consignee's business deals in goods of that description, by a consignor who,

(i) in the ordinary course of the consignor's business deals in goods of that description, and

(ii) reserves an interest in the goods after they have been delivered,

but does not include an agreement under which goods are delivered

(iii) to an auctioneer for sale, or

(iv) to a consignee for sale, lease or other disposition if the consignee is generally known to the

creditors of the consignee to be selling or leasing goods of others;

COMMENT

There are several minor differences between the existing Act and the proposed Act. However, none of these reflect a change in scope or policy of the Act. They are designed to clarify the definition.

It will be noted that the defined term has been changed from "consignment" to "commercial consignment". This was done to avoid confusion with the term "consignment" contained in section 3(1)(b). In this section the term "consignment" refers to a transaction in the form of assignment that, however, is essentially a security agreement. Security consignments are subject to all of the provisions of the Act. The term "commercial consignment" refers to certain types of true consignments that are deemed by section 3(2) to be security agreements only for the purposes of the conflict, perfection and priority sections of the Act.

The definition in the proposed Act specifically excludes consignments to auctioneers. This exclusion is implicit in the definition in the existing Act.

The definition in the proposed Act excludes consignments where it is generally known to the creditors of the consignee that he or she is selling or leasing goods of others, while the definition in the existing Act refers to general knowledge of this fact in the area in which the debtor carries on business. It was thought that since creditors are the primary recipients of the protection provided by inclusion of true consignments in the Act, it was desirable to make specific reference to them in this context.

(existing and [proposed Act])

(h)[(i)] "consumer goods" means goods that are used or acquired for use primarily for personal, family or household purposes;

COMMENT

There is no change in this definition. However, see section 1(3) of the proposed Act.

(existing and [proposed Act])

(i)[(j)] "court" means Her Majesty's Court of Queen's Bench;

COMMENT

There is no change in this definition.

(existing Act)

(j) "creditor" includes an assignee for the benefit of creditors, a trustee in bankruptcy and an executor, an administrator or a committee.

* * *

(proposed Act)

(k) "creditor" includes an assignee for the benefit of creditors, an executor, an administrator or a committee of a creditor;

COMMENT

This definition has been changed to delete the reference to a trustee in bankruptcy. It is clear that in those sections of the Act containing a reference to a creditor, it is inappropriate to substitute a reference to a trustee in bankruptcy.

(existing Act)

[the term "crops" is not defined]

* * *

(proposed Act)

(l) "crops" means crops, whether matured or otherwise, and whether naturally grown or planted, attached to land by roots or forming part of trees or plants attached to land, and includes only trees that

(i) are being grown as nursery stock,

(ii) are being grown for uses other than for the production of lumber and wood products, or

(iii) are intended to be replanted in another location for the purpose of reforestation;

COMMENT

The Commission has decided to include in the proposed Act a definition of the term "crops". This term is used in several sections in the Act. However, the definition has its primary significance in the context of section 37, a section that has no counterpart in the existing Act. The effect of section 37 is to provide a system for rationalization of the rights of persons who take security interests in standing crops with persons who acquire interests in the land to which the crops are attached. This regime is almost identical to that applicable to fixtures.

It was felt by the Commission that too much uncertainty and potential for deception exists under the existing Act which treats growing crops as goods (see section 2(r)), but which provides no specific priority rules for cases where security interests in crops come into conflict with rights acquired in the real property prior to the harvest of the crops.

(existing Act)

(k) "debtor" means a person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes:

(i) the person who receives goods from another person under a consignment;

(ii) the lessee under a lease;

(iii) the assignor of an account or chattel paper;

(iv) the transferee of a debtor's interest in collateral; and

(v) any one or more of the persons mentioned in subclauses (i) to (iv) where the context so requires;

and, where a debtor is not the owner of the collateral, means the owner of the collateral, in any provision of this Act dealing with collateral, an the obligor, in any provision of this Act dealing with the obligation, and may include both where the context so requires.

* * *

(proposed Act)

(m) "debtor" means

(i) a person who owes payment or performance of an obligation secured, whether or not that person owns or has rights in the collateral,

(ii) a person who receives goods from another person under a commercial consignment,

(iii) a lessee under a lease for a term of more than one year,

(iv) a transferor of an account or chattel paper,

(v) in sections 17, 24, 26, 58, 59(14), 61(7), 64(3) and 65, the transferee of a debtor's interest in the collateral,

and, if the person referred to in (i) and the owner of the collateral are not the same person means

(vi) where the term is used in a provision dealing with the collateral, the person who has an interest in the collateral,

(vii) where the term is used in a provision dealing with the obligation, the obligor,

(viii) where the context permits, both the owner and the obligor;

COMMENT

This definition has been changed in a number of ways; however, the changes do not reflect any change in policy or approach. For the most part, the changes have been made to improve the understandability and accuracy of the definition.

It will be noted that the references to a "person who receives goods from another person under a consignment" and to a "lessee under a lease" in the existing Act have been changed respectively to references to a "person who receives goods from another person under a commercial consignment" and to a "lessee under a lease for a term of more than one year". Since the function of these provisions is to bring within the definition consignees and lessees under the deemed security agreement referred to in section 3(2), it is important the definition be more precise in this regard.

Clause (iv) of the existing Act is much too broad in scope. It deems any transferee of the debtor's interest in the collateral to be a debtor. While this is a useful feature in the context of some sections, it should not apply to other sections which refer to the term debtor. For example, section 60(3) makes the "debtor" liable for any deficiency. It is most unlikely that the Legislature intended that a transferee of the debtor's interest in the collateral be treated also as an assignee of the debtor's obligations under a contract with a third party giving to the third party a security interest in the transferred interest.

Clause (v) of the definition in the proposed Act corrects this problem by specifically identifying the sections in which the term "debtor" is to be read as including a transferee of the debtor's interest in the collateral.

(existing and [proposed Act])

(l)[(n)] "default" means

(a) the failure to pay or otherwise perform the obligation secured when due or

(b) the occurrence of any event or set of circumstances whereupon, under the terms of the security agreement, the security becomes enforceable;

COMMENT

There is no change in this definition.

(existing Act)

(m) "document of title" means any writing that purports to be issued by or addressed to a bailee and purports to cover any goods in the bailee's possession that are identified, or fungible portions of an identified mass, and that, in the ordinary course of business, is treated as establishing that the person in possession of it is entitled to receive, hold and dispose of the document and the goods it covers;

* * *

(proposed Act)

(o) "document of title" means a writing issued by or addressed to a bailee

(i) that covers goods in the bailee's possession that are identified or are fungible portions of an identified mass, and

(ii) in which it is stated that the goods identified in it will be delivered to a named person, or to the transferee of that person, or to bearer or to the order of a named person;

COMMENT

There are a few stylistic changes between this definition in the existing Act and the definition in the proposed Act. These changes are designed to clarify the definition and to bring it in line with definitions of this term in other Western Canadian Acts which reflect the use of the term in the Uniform Warehouse Receipts Act.

There is one substantive change in the definition. It is not clear that the definition in the existing Act includes both negotiable and non-negotiable documents of title. It should, since the Act refers to both types of documents. Accordingly, clause (ii) includes a specific reference to documents of title in which it is stated that the goods identified in it will be delivered to bearer or to the order of a named person.

(existing Act)

(n) "equipment" means goods that are not inventory or consumer goods;

* * *

(proposed Act)

(p) "equipment" means goods that are held by a debtor other than as inventory or consumer goods;

COMMENT

The definition in the proposed Act simply makes explicit what is implicit in the definition in the existing Act: goods are to be classified as "equipment", "consumer goods" or "inventory" by looking at the way in which they are "held" by the debtor. (See also section 2(3) of the proposed Act.)

(existing Act)

(o) "financing change statement" or "financing statement" means a document, in prescribed form, that is required or permitted to be registered pursuant to Part IV.

* * *

(proposed Act)

(q) "financing change statement" means a writing in prescribed form;

(r) "financing statement" means

(i) a printed financing statement in the form authorized under the regulations and required or permitted to be registered under this Act, and

(ii) where the context permits,

(A) data authorized under the regulations to be transmitted to an office of the Registry to effect a registration,

PROPOSED ACT S. 2(1)(s) **EXISTING ACT S. 2(1)(p)**

(B) a financing change statement, and

(C) a security agreement registered prior to the date The Personal Property Security Act S.S. 1980-81, c. P-6.1 came into force.

COMMENT

The definition of the terms "financing change statement" and "financing statement" in the proposed Act are somewhat more precise than its counterparts in the existing Act. Under the proposed Act, a reference in a section to a "financing statement" could mean, depending upon the context, either a financing statement or a financing change statement. However, where there is a reference in a section to a financing change statement, this cannot include a financing statement. This approach to the definitions of these terms has facilitated the drafting of several sections of the proposed Act.

The definition of financing statement in the proposed Act contains a reference to a security agreement registered prior to the date the existing Act comes into force. This is a reference to a security agreement registered under pre-Personal Property Security Act registration legislation that is deemed to be perfected without registration of a financing statement under the existing or proposed Act. Since the carry-over periods for registrations of conditional sales contracts, bills of sale, chattel mortgages and assignments of book debts have now expired (see section 72 of the existing Act), this reference has relevance only in the context of registrations under The Corporation Securities Registration Act.

The definition also includes "data" transmitted to the Registry. This feature of the definition is designed to accommodate a remote computer registration facility under which registrations can be effected electronically without the need to use a printed financing statement.

(existing Act)

(p) "fixtures" means goods that are installed on or affixed to real property in such a manner or under such circumstances as to result in their becoming in law fixtures to the realty, but does not include building materials.

* * *

(proposed Act)

(s) "fixture" does not include building materials;

COMMENT

It is apparent that the definition of the term "fixtures" in the existing Act is not a definition at all but rather a reference to the common law rules that determine when goods become fixtures to land. For this reason, the Commission has decided to shorten the definition so as to remove from it that portion that serves no real function.

(existing Act)

(q) "fungible", with respect to goods or securities, means goods or securities any unit of which is, by nature or usage of trade, the equivalent of any other like unit, but goods or securities which are not fungible are deemed to be fungible for the purposes of this Act to the extent that, under the security agreement, unlike units are treated as equivalent;

* * *

(proposed Act)

There is no equivalent provision in the proposed Act.

COMMENT

Two reasons underlie the decision not to include this definition in the proposed Act. In the first place the term is used in one section only: section 17. In the second place, the dictionary meaning of the term can be used in the context of section 17 without affecting implementation of the policy of that section.

(existing Act)

(r) "future advance" means the payment of money, the provision of credit or the giving of value by the secured party pursuant to the terms of a security agreement, whether or not the secured party is obligated to pay the money, advance the credit or give the value, and includes all advances and expenditures made by the secured party for the protection, maintenance, preservation or repair of the collateral.

* * *

(proposed Act)

(t) **"future advance" means an advance, whether or not given pursuant to a commitment and includes advances and expenditures made for the protection, maintenance, preservation or repair of the collateral;**

COMMENT

The differences between the definition of "future advance" in the existing and the definition of the term in the proposed result from the decision to include in the proposed Act a new and separate definition of the term "advance". This change was thought to be desirable as a "housekeeping" measure. Both section 20(2) and its counterpart in the proposed Act, section 35(6), refer to "advances" whereas sections 14 and 35(4) of the existing Act and their counterparts in the proposed Act, sections 14 and 35(5), refer to "future advances".

(existing Act)

(s) **"goods" means tangible personal property, other than choses in action and money, and includes fixtures, growing crops and the unborn young of animals but does not include timber until it is cut or minerals until they are extracted.**

* * *

(proposed Act)

(u) **"goods" means tangible personal property, fixtures, crops and the unborn young of animals but does not include chattel paper, a document of title, an instrument, a security, money or trees other than crops until they are severed or minerals until they are extracted;**

COMMENT

The definition of "goods" in the proposed Act removes some small ambiguities in the definition in the existing Act with respect to intangible rights that can be seen as having a physical existence in the form of chattel paper, a document of

title, an instrument or a security. In addition, the definition in the proposed Act includes in the term tree crops as reflected in the definition of "crops".

(existing Act)

(t) "indebtedness" means, when used with respect to a lease, obligation secured;

* * *

(proposed Act)

There is no equivalent provision in the proposed Act.

(existing Act)

(u) "instrument" means a bill of exchange, note or cheque within the meaning of the *Bills of Exchange Act* (Canada), or any other writing that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, but does not include

(i) a writing that is chattel paper;

(ii) a document of title; or

(iii) a security other than a security that is a bill of exchange or note within the meaning of the *Bills of Exchange Act* (Canada).

* * *

(proposed Act)

(v) "instrument" means

(i) a bill of exchange, note or cheque within the meaning of the Bills of Exchange Act (Canada),

(ii) any other writing that evidences a right to payment of money and is of a type that in the ordinary course of business is transferred by delivery with any necessary endorsement or assignment, or

(iii) a letter of credit or an advice of credit if the letter of credit or advice of credit states on it that it must be surrendered on claiming payment,

but does not include

(iv) chattel paper, a document of title or a security, or

(v) a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing.

COMMENT

It will be noted that there are two changes to this definition. The first is the inclusion of a letter of credit or advice of credit that states that it must be surrendered on claiming payment. This feature of the definition represents a departure from traditional Anglo-Canadian law relating to letters of credit under which transfer of the right to payment arising under the letter was transferred as a simple chose in action. There is evidence that practices in Canada are changing and that letters of credit or advices of credit are beginning to acquire aspects of "negotiability" to the extent that the rights they represent are treated as being transferable by delivery of the letter of credit or advice of credit if the writing so provides. The proposed Act has been designed to accommodate these practices. (See e.g. section 31(3).)

The second significant change in the definition is the reference to writing that provides for a mortgage of an interest in land. The relevance of this feature of the definition is fully explained in the Comment following section 4(f).

(existing Act)

(v) "intangible" means all personal property, including choses in action, that is not goods, chattel paper, documents of title, instruments or securities;

* * *

(proposed Act)

(w) "intangible" means personal property that is not goods, chattel paper, a document of title, an instrument, money or a security;

PROPOSED ACT S. 2(1)(x) **EXISTING ACT S. 2(1)(w)**

COMMENT

No changes of substance have been made in this definition.

(existing Act)

(w) "inventory" means goods

(i) that are held by a person for sale or lease, or that have been leased by that person

(ii) that are to be furnished or have been furnished under a contract of service, or

(iii) that are raw materials, work in progress or materials used or consumed in a business or profession;

* * *

(proposed Act)

(x) "inventory" means goods that are

(i) held by a person for sale or lease, or that have been leased by that person as lessor,

(ii) to be furnished or have been furnished under a contract of service, or

(iii) raw materials or work in progress, or

(iv) materials used or consumed in a business or profession;

COMMENT

The changes made in this definition are stylistic.

(existing Act)

(x) "judge" means a judge of the court.

* * *

(proposed Act)

There is no equivalent provision in the proposed Act.

(existing Act)

(y) "lease for a term of more than one year" includes:

(i) a lease for an indefinite term even though the lease is determinable by one or both of the parties not later than one year of its execution,

(ii) a lease for a term of one year or less that is automatically renewable of that is renewable at the option of one of the parties or by agreement for one or more terms, the total of which may exceed one year;

(iii) a lease initially for a term of less than one year where the lessee retains uninterrupted or substantially uninterrupted possession of the goods leased for a period in excess of one year after the day he first acquired possession of the goods, and the lease is deemed to be a lease for more than one year as soon as the lessee's possession extends beyond one year;

but does not include:

(iv) a lease transaction involving a lessor who is not regularly engaged in the business of leasing goods;

(v) a lease of any prescribed goods, regardless of the length of the term of the lease.

* * *

(proposed Act)

(y) "lease for a term of more than one year" includes

(i) a lease for an indefinite term and includes a lease for an indefinite term that is determinable by one or both of the parties not later than one year from the date of its execution,

(ii) a lease initially for a term of one year or where the lessee, with the consent of the lessor, retains uninterrupted or substantially uninterrupted possession of the leased goods for a period in excess of one year after the day the lessee, with the consent of the lessor, first acquired possession of them, but the lease does not become a lease for a term of more than one year until the lessee's possession extends for more than one year,

(iii) a lease for a term of one year or less where

(A) the lease provides that it is automatically renewable or that it is renewable at the option of one of the parties or by agreement of the parties for one or more terms, and

(B) the total of the terms, including the original term, may exceed one year,

but does not include

(iv) a lease involving a lessor who is not regularly engaged in the business of leasing goods,

(v) a lease of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land, or

(vi) a lease of prescribed goods, regardless of the length of the lease term;

COMMENT

A number of small changes have been made in this definition in order to provide clarification of the concepts involved.

The only substantive change is the addition of clause (v) which has the effect of excluding from the definition certain leases of household furnishings or appliances as part of the lease of land. This exclusion is dictated by practical considerations. When furnished premises are rented, technically there is a lease

of the furniture and a lease of the land. Under the existing Act, the lease of the furniture may well be initially or ultimately a lease of goods for a term of more than one year. Failure on the part of the lessor to register a financing statement relating to the lease in the Registry could result in the loss or subordination of his or her interest in the furnishings. Owners of large apartment buildings are required to register large numbers of financing statements.

The Commission has concluded that the Act should not apply to leases of furniture where the furniture and equipment is closely associated with a lease of the premises in which the furniture is used. It is satisfied that the policy objectives of including leases of goods in the registration, priority and conflict of laws provisions of the Act will not be abridged by this change.

(existing and proposed Act)

(z) "money" means a medium of exchange authorized by the Parliament of Canada or authorized or adopted by a foreign government as part of its currency;

COMMENT

There is no change in this definition.

(existing Act)

(aa) "obligation secured" means, when determining the amount payable under a lease the amount originally contracted to be paid under the lease, any other amount payable pursuant to the terms of the lease, and any other amount required to be paid by the lessee to obtain full ownership of the collateral;

* * *

(proposed Act)

(aa) "obligation secured" means, when determining the amount payable under a lease that secures payment or performance of an obligation,

(i) the amount originally contracted to be paid under the lease,

(ii) any other amount payable pursuant to the terms of the lease, and

(iii) any other amount required to be paid by the lessee to obtain ownership of the collateral,

less any amount paid before the determination;

COMMENT

Only two minor changes have been made to the substance of this definition. The first is to make it clear that the definition applies only with respect to security leases. It is only in this context that the issue addressed by the definition can arise. Generally the Act does not apply to inter partes rights of parties to a true lease.

The changed definition makes it clear that any amount paid by the lessee-debtor during the currency of the agreement must be deducted.

(existing Act)

(bb) "pawnbroker" means a person who engages in the business of granting consumer credit and who takes a security interest in the form of a pledge of goods to secure the consumer credit or who purchases goods under an agreement or undertaking, express or implied, that those goods may be afterwards repurchased or redeemed on terms, and "consumer credit" means credit granted to an individual for personal, family or household purposes by a person or organization in the business of granting credit, and, unless the agreement under which credit is granted or the context of the transaction indicates otherwise, a grant of credit is presumed to be a grant of consumer credit.

* * *

(proposed Act)

(bb) "pawnbroker" means a person who engages in the business of granting credit to individuals for personal, family or household purposes and who

(i) takes security interests in the form of pledges to secure the credit, or

(ii) purchases consumer goods under agreements or undertakings, express or implied, that the goods may be repurchased by the sellers;

COMMENT

This definition has been modified in order to effect some economy of words. For the most part, the definition in the proposed Act covers the same territory as does the definition in the existing Act, but does so with far fewer words. The definition in the proposed Act does not contain the presumption of consumer credit contained in the existing Act. The Commission has concluded that this presumption is unnecessary since the context of the transaction will make it easy to determine whether or not a consumer credit transaction is involved.

(existing Act)

(cc) "person" includes an individual, partnership, association, body corporate, trustee, executor, administrator or legal representative;

* * *

(proposed Act)

There is no equivalent provision in the proposed Act.

COMMENT

The Commission has concluded that this definition is not needed. (See The Interpretation Act R.S.S. 1978, c. I-11. s. 21(1) 19.) There is no need to make specific reference to quasi-legal "bodies" such as partnerships and associations since the common law prescribed the representatives of such bodies for purposes associated with the acquisition of rights and the discharge of obligations.

(existing and [proposed Act])

(dd)[cc] "prescribed" means prescribed in the regulations;

COMMENT

There are no changes in this definition.

(existing Act)

(ee) "proceeds" means identifiable or traceable personal property in any form or fixtures derived directly or indirectly from any dealing with the collateral or proceeds therefrom, and includes insurance payments or any other payments as indemnity or compensation for loss of or damage to the collateral or proceeds therefrom, or any right to such payment, and any payment made in total or partial discharge of an intangible, chattel paper, instrument or security; and money, cheques and deposit accounts in banks, credit unions, trust companies or similar institutions are cash proceeds and all other proceeds are non-cash proceeds;

* * *

(proposed Act)

(dd) "proceeds" means

(i) identifiable or traceable personal property, fixtures and crops

(A) derived directly or indirectly from any dealing with collateral or the proceeds of collateral, and

(B) in which the debtor acquires an interest,

(ii) a right to an insurance payment or any other payment as indemnity or compensation for loss of or damage to the collateral or proceeds of the collateral, and

(iii) a payment made in total or partial discharge or redemption of an intangible, chattel paper, an instrument or a security;

PROPOSED ACT S. 2(1)(dd) EXISTING ACT S. 2(1)(ff)

COMMENT

The definition of "proceeds" in the proposed Act differs from its counterpart in the existing Act in one important respect. It will be noted that the proposed new definition is somewhat more restrictive in its scope in that in order for property to be proceeds, inter alia, it must be property in which the debtor acquires an interest, and where goods are involved, the debtor must have acquired possession of the property.

The significance of the limitations contained in the proposed Act is demonstrated in the following scenarios:

> Assume that SP takes and perfects a security interest in "bicycles" owned by D. D sells a red bicycle out of the ordinary course of business to B1. B1 pays part of the price by trading his green bicycle. D takes possession of the green bicycle. Clearly, the green bicycle is proceeds of the dealing with the red bicycle. B1 then sells the red bicycle to B2 who pays part the price by trading his blue bicycle. B1 then sells the blue bicycle to B3 who pays cash for it and who acquires it without knowledge of any security interest in it.

Under the definition of proceeds in the existing Act, it might be argued that SP has a proceeds security interest in the green bicycle and the blue bicycle along with its original security interest in the red bicycle. The blue bicycle bought by B3 was "derived" by B1 from a dealing with the red bicycle. However, it is clearly objectionable to conclude that SP has priority over B3 with respect to the blue bicycle. D never acquired a proprietary interest in the blue bicycle nor did it ever come into his possession. The Commission has taken the position that the proposed Act should make the limits to the concept of "proceeds" more explicit.

The policy basis for the concept is to provide a statutory security interest in property obtained by the debtor as a result of a dealing with the original collateral in situations where the original collateral is no longer collateral (e.g. a sale in the ordinary course of business) or where the original collateral is difficult to seize or has depreciated in value in the hands of the transferee. There is no policy reason why the concept should extend so far as to encompass the sale of the blue boat to B3. To recognize that it does is to create the potential for significant injustice and conceptual confusion.

(existing Act)

(ff) "purchase" includes taking by sale, lease, discount, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other voluntary transaction creating an interest in personal property;

PROPOSED ACT S. 2(1)(ee)-(ff) **EXISTING ACT S. 2(1)(gg)**

* * *

(proposed Act)

(ee) "purchase" means taking by sale, lease, discount, assignment, negotiation, mortgage, pledge, lien, issue, reissue, gift or any other consensual transaction creating an interest in personal property;

COMMENT

A few minor changes have been made to this provision. The definition is all-inclusive so that its wording has been changed to reflect this fact. "Assignment" has been added to the list of transactions.

(existing Act)

(gg) "purchase-money security interest" means:

(i) a security interest that is taken or reserved by a seller, lessor or consignor of personal property to secure payment of all or part if its sale or lease price;

(ii) a security interest that is taken by a person who gives value for the purpose of enabling the debtor to acquire rights in or to the personal property, to the extent that the value is applied to acquire such rights;

(iii) the interest of a lessor of goods under a lease for a term of more than one year; or

(iv) the interest of a person who delivers goods to another person under a consignment;

* * *

(proposed Act)

(ff) "purchase money security interest" means

(i) a security interest taken in collateral to the extent that it secures all or part of its purchase price,

(ii) a security interest taken in collateral by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, to the extent that the value is applied to acquire such rights,

(iii) the interest of a lessor of goods under a lease for a term of more that one year, and

(iv) the interest of a consignor who delivers goods to a consignee under a commercial consignment,

but does not include a transaction of sale and the lease back to the seller, and for the purposes of this clause, "purchase price" and "value" include credit charges or interest payable for the purchase or loan credit;

COMMENT

Several minor changes have been made in this provision. However, none of them involves a change in policy.

An ambiguity contained in clause (ii) of the existing Act has been removed. As presently drafted it is not clear that the security interest must be in the property that is acquired with the value. Under the proposed Act it is clear that this is a requirement.

The definition in the proposed Act extends the purchase money security interest to include credit and interest charges. This is necessary since, on a strict application of the wording of the existing Act, credit charges may not be viewed as part of the purchase price of goods and interest charges are not value given by the debtor for the purposes of acquiring rights in the collateral.

The proposed Act excludes sales and lease back arrangements from the concept of purchase money security interest. These arrangements do not result in the debtor acquiring new assets. They are essentially loan transactions secured by an interest in property owned by the debtor prior to the date the transaction in entered into.

(existing and [proposed Act])

(hh)[gg] "receiver" includes a receiver-manager;

COMMENT

There is no change in this definition.

(existing and [proposed Act])

(ii)[hh] "registrar" means the Registrar of Personal Property Registry designated under section 42;

(jj)[ii] "registry" means the Personal Property Registry established under section 41;

COMMENT

There are no changes in these definitions.

(existing Act)

(kk) "secured party" means a person who has a security interest and ,where a security agreement is embodied in a trust indenture, means the trustee;

* * *

(proposed Act)

(jj) "secured party" means

(i) a person who has a security interest,

(ii) a person who holds a security interest for the benefit of another person, and

(iii) the trustee, if a security interest is embodied in a trust indenture;

COMMENT

This definition has been changed so as to include a reference to a person who holds a security interest for the benefit of another person. It was thought that the addition of the feature, while not absolutely necessary, was advisable in order to encompass the various types of syndicated loan arrangements that are currently in use.

(existing Act)

(11) "security" means a share, stock, warrant, bond, debenture, debenture stock or the like issued by a body corporate or other person that is:

(i) in a form recognized in the area in which it is issued or dealt with as evidencing a share, participation, or other interest in property or in an enterprise, or that evidences an obligation of the issuer; and

(ii) of a type which, in the ordinary course of business, is transferred by delivery with necessary endorsement, assignment, registration in the books of the issuer or agent for the issuer, or compliance with the restrictions on transfers;

* * *

(proposed Act)

(kk) "security" means a document that is

(i) issued in bearer or registered form,

(ii) of a type commonly dealt with upon securities exchanges or markets or commonly recognized in an area in which it is issued or dealt in as a medium of investment;

(iii) one of a class or series or, by its terms, divisible into classes or series of documents, and

(iv) evidence of a share, participation or other interest in property or in an enterprise or is evidence of an obligation of the issuer,

and includes an uncertificated security within the meaning of the law relating to business corporations, but does not include a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing;

COMMENT

The Commission has concluded that the definition of "security" in the existing Act should be replaced with the definition set out above. In essential respects, there is no difference between the two definitions. However, it was thought desirable to have the same definition of the term "security" in both The Personal Property Security Act and in The Business Corporations Act. Accordingly, the definition contained in the proposed Act has been changed to conform generally to section 44(2)(n) of The Business Corporations Act.

The definition in the proposed Act contains two features not found in the former Act or in The Business Corporations Act. The first of these is a reference to uncertificated securities. A practice is now developing in commercially advanced countries to recognize paperless securities. Under this practice a security is nothing more than an entry in the records of a clearing corporation and a transfer of the security is effected by a notation in those records. For the purposes of The Personal Property Security Act this notation is the equivalent of a transfer of physical possession of the security. (See comment to section 24.) While uncertificated securities are not currently in use in Saskatchewan, the Commission has decided to have the proposed Act reflect their potential use so as to avoid the necessity to amend the Act when business corporations law is amended to facilitate the use of uncertificated securities.

The second significant change in the definition is the reference to writing that provides for a mortgage of an interest in land. The relevance of this feature of the definition is fully explained in the Comment following section 4(f).

(existing Act)

(mm) "security agreement" means an agreement that creates or provides for a security interest, and includes a document evidencing a security agreement when the context permits;

* * *

(proposed Act)

(ll) "security agreement" means an agreement that creates or provides for a security interest, and if the context permits, includes a writing that evidences a security agreement;

COMMENT

There is no change in this definition.

(existing Act)

(nn) "security interest" means an interest in goods, documents of title, securities, chattel paper, instruments, money, or intangibles that secures payment or performance of an obligation and is deemed to include:

(i) an interest arising from an assignment of accounts or transfer of chattel paper;

(ii) the interest of a person who delivers goods to another person under a consignment; and

(iii) the interest of a lessor under a lease for a term of more than one year,

notwithstanding that the interests described in subclause (i) to (iii) may not secure payment or performance of an obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading to his own order or to the order of his agent, unless the parties have otherwise evidenced an intention to create or provide for a security interest.

* * *

(proposed Act)

(mm) "security interest" means

(i) an interest in goods, a document of title, a security, chattel paper, an instrument, money or an intangible that secures payment or performance of an

obligation, but does not include the interest of a seller who has shipped goods to a buyer under a negotiable bill of lading or its equivalent to the order of the seller or to the order of an agent of the seller, unless the parties have otherwise evidenced an intention to create or provide for a security interest in the goods, and

(ii) the interest of

(A) a transferee under a transfer of an account or chattel paper,

(B) a consignor who delivers goods to a consignee under a commercial consignment, and

(C) a lessor under a lease for a term of more than one year,

notwithstanding that the interest does not secure payment or performance of an obligation;

COMMENT

The changes in this definition are largely structural. Since the clause dealing with the interest of a seller who has shipped goods under an order bill of lading addresses an exception to the definition of a true security interest and not a deemed security interest, it is more appropriately inserted before the enumeration of the deemed security interests.

(existing and [proposed Act])

(oo)[nn] "specific goods" means goods identified and agreed upon at the time a security agreement in respect of those goods is made;

COMMENT

There is no change in this definition.

(existing Act)

(pp) "trust indenture" means any deed, indenture, or document, however designated: including any supplement or amendments thereto, by the terms of which a body corporate issues or guarantees, or provides for the issue or guarantee of, debt obligations and in which a person is appointed as trustee for the holder of the debt obligations issued, guaranteed or provided for thereunder and secured by a security interest;

* * *

(proposed Act)

(oo) "trust indenture" means a deed, indenture, or document, however designated, by the terms of which a person issues or guarantees or provides for the issue or guarantee of debt obligations secured by a security interest and in which another person is appointed as trustee for the holders of the debt obligations issued, guaranteed or provided for under the deed, indenture or document;

COMMENT

The changes in this definition are largely stylistic. Note, however, under the existing Act the definition applies only to debt obligations issued or guaranteed by a corporate debtor. There is no similar limitation in the proposed Act.

(existing and [proposed Act])

(qq)[pp] "value" means any consideration sufficient to support a simple contract, and includes an antecedent debt or liability, and "new value" means value other than antecedent debt or liability.

COMMENT

There is no change in this definition, except the addition of the reference to "new value".

(existing Act)

67(3) For the purposes of this Act, a person knows or has notice when:

(a) in the case of an individual, information comes to his attention under circumstances in which a reasonable person would take cognizance of it,

(b) in the case of a partnership, information has come to the attention of one or more of the partners or a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it,

(c) in the case of a body corporate,information has come to the attention of:

(i) a managing director or officer of the corporation; or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates;

under circumstances in which a reasonable person would take cognizance of it or the information in writing has been delivered to the registered office of the body corporate or attorney for an extra-provincial body corporate appointed under section 268 of *The Business Corporations Act* or section 251 of *The Non-profit Corporations Act*.

* * *

(proposed Act)

2(2) For the purposes of this Act,

(a) a natural person knows or has knowledge when information is acquired by the person under circumstances in which a reasonable person would take cognizance of it,

(b) a partnership knows or has knowledge when information has come to the attention of one of the general partners or a person having control or management of the partnership business under circumstances in which a reasonable person would take cognizance of it,

(c) a corporation knows or has knowledge when information has come to the attention of

(i) a managing director or officer of the corporation, or

(ii) a senior employee of the corporation with responsibility for matters to which the information relates,

under circumstances in which a reasonable person would take cognizance of it or when information in writing has been delivered to the corporation's registered office or attorney for service, and

(d) the members of an association know or have knowledge when information has come to the attention of

(i) a managing director or officer of the association, or

(ii) a senior employee of the association with responsibility for matters to which the information relates,

(iii) all members,

under circumstances in which a reasonable person would take cognizance of it.

(e) the government knows or has knowledge when information has come to the attention of a senior employee of the government with responsibility for matters to which the information relates under circumstances in which a reasonable person would take cognizance of it.

COMMENT

There are several changes in this provision. The first is its position in the Act. The provision has been moved up as part of section 2 since it is in the nature of a definition and should be part of the definition section. There is also a change in terminology. Under the proposed Act, the words "knowledge" (including its derivatives) and "notice" are used to mean two very different things. A "notice" is a written document containing information. The word "knowledge" is used to refer to information acquired by someone.

Where partnerships are involved, the proposed Act makes it clear that the information must come to the attention of a general partner and not a limited partner.

The new definition deals with the acquisition of knowledge by the relevant persons involved with an association and by employees of a government.

(existing Act)

There is no equivalent to this provision in the existing Act.

* * *

(proposed Act)

2(3) Unless provided otherwise in this Act, the determination whether goods are "consumer goods", "inventory" or "equipment" shall be made as of the time the security interest in the goods attaches.

COMMENT

This provision is designed to provide guidance in connection with the categorization of goods which is an important feature of several aspects of the Act and the Personal Property Regulations. Under the categorization system of the Act, all goods must be consumer goods, inventory or equipment. These categories are not based on the characteristic of the goods involved; they are based on the use to which the goods are being put by the debtor at the relevant time. The purpose of this provision is the make it clear that a change in the use by the debtor after attachment of the security interest does not affect the validity of a registration or the legal status of the security interest.

There are a few sections which are not affected by this provision. (See sections 10(4) and 30(3).)

(existing Act)

There is no equivalent to this provision in the existing Act.

* * *

(proposed Act)

2(4) Proceeds are traceable whether or not there is a fiduciary relationship between the person who has a security interest in the proceeds, as provided in section 289, and the person who has rights in or has dealt with the proceeds.

COMMENT

The purpose of this section is to remove the doubt that has been raised by recent decisions in Ontario and Manitoba in which it has been suggested that there is no right to invoke tracing rules of equity to earmark proceeds unless there is a fiduciary relationship between the secured party and the debtor.

PART I

APPLICATION OF THE ACT

(existing Act)

3 Subject to sections 4 and 55, this Act applies to every security agreement, without regard to its form and without regard to the person who has title to the collateral, that creates a security agreement including, but without limiting the generality of the foregoing:

(a) a chattel mortgage, conditional sale, floating charge, pledge, debenture, trust indenture or trust receipt, lease, assignment, consignment or transfer of chattel paper; and

(b) an assignment of accounts, transfer of chattel paper, consignment, or a lease for a term of more than one year, notwithstanding that such interests may not secure payment or performance of an obligation.

* * *

(proposed Act)

3(1) Subject to section 4, this Act applies

(a) to every transaction that in substance creates a security interest, without regard to its form and without regard to the person who has title to the collateral, and

(b) without limiting the generality of clause (a), to a chattel mortgage, conditional sale, floating charge, pledge, trust indenture, trust receipt, or assignment, consignment, lease, trust or transfer of chattel paper that secures payment or performance of an obligation.

(2) Subject to section 4 and section 55, this Act applies to a transfer of an account or chattel paper, a lease for a term of more than one year and a commercial consignment, notwithstanding that the transfer, lease, or consignment does not secure payment or performance of an obligation.

COMMENT

The differences between section 3 of the existing Act and its counterpart in the proposed Act are largely cosmetic. There is one structural change, however. Section 3 of the existing Act opens with a characterization rule used to identify true security agreements. Clause (a) includes a list of examples of different types of true security agreements. However, clause (b) deals with deemed security agreements which, technically, do not fall within the general rule of the opening part of the section. Yet, given the structure of the section, they would appear to be more examples of true security agreements. This minor structural difficulty with section 3 of the existing Act has been eliminated in section 3 of the proposed Act which separates transactions falling within the scope of the Act into two distinct categories: transactions that, under the substance test of subsection (1), are true security agreements: and the deemed security agreements described in subsection (2).

Clause (1)(a) of the proposed Act states a "substance" test for characterization of transactions falling within the scope of the Act. This is implied in the existing Act. Included in the non-exhaustive list of types of transactions falling within the proposed Act are "trusts" that secure payment or performance of an obligation.

(existing Act)

4 Except as specifically otherwise provided, this Act does not apply to:

(a) a lien, charge or other interest given by statute or a lien given by rule of law for the furnishing of goods, services or materials;

(b) an assignment of an interest or claim in or under any contract of annuity or policy of insurance, except insofar as the money payable under a policy of insurance is or would be indemnity or compensation for loss of or damage to collateral, or any right to any such moneys payable;

(c) an assignment of present or future wages, salary, pay, commission or any other compensation for labour or personal services;

(d) an assignment of a right to payment under a contract to an assignee who is to perform the assignor's obligations under the contract;

(e) the creation or assignment of an interest in or a lien on real property, including chattels real;

(f) the assignment of any right to payment that arises in connection with an interest in or a lease on real property other than:

(i) an assignment of rental payments payable under a lease of real property; or

(ii) a right to payment evidenced by a security;

(g) a sale of accounts or chattel paper as part of a sale of the business out of which they arose, unless the vendor remains in apparent control of the business after the sale;

(h) an assignment of accounts made solely to facilitate the collection of accounts for assignor;

(i) an assignment of a claim for damages or a judgment representing a right to damages;

(j) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency.

* * *

(proposed Act)

4 Except as otherwise provided in this Act, this Act does not apply to

(a) a lien, charge or other interest given by statute or rule of law,

(b) the creation or transfer of an interest or claim in or under a contract of annuity or policy of insurance except the transfer of a right to money or other value payable under a policy of insurance as indemnity or compensation for loss of or damage to collateral,

(c) the creation or transfer of an interest in present or future wages, salary, pay, commission or any other compensation for labour or personal services other than fees for professional services,

(d) a transfer of an unearned right to payment under a contract to a transferee who is to perform the transferor's obligations under the contract,

(e) the creation or transfer of an interest in land including a lease,

(f) the creation or transfer of a right to payment that arises in connection with an interest in or a lease of land other than a right to payment evidenced by a security or instrument,

(g) a sale of accounts or chattel paper as part of a sale of a business out of which they arose unless the vendor remains in apparent control of the business after the sale,

(h) a transfer of accounts made solely to facilitate the collection of accounts for the transferor,

(i) the creation or transfer of a right to damages in tort,

(j) an assignment for the general benefit of creditors made pursuant to an Act of the Parliament of Canada relating to insolvency,

(k) a security agreement governed by a statute of the Parliament of Canada that deals with the rights of parties to the agreement or the rights of third parties affected by a security interest created by the agreement, including but without limiting the generality of the foregoing,

(i) any agreement governed by Part V, Division B of the Bank Act , and

(ii) a mortgage under the Shipping (Canada) Act.

COMMENT

Section 4(a)

Section 4(a) has a broader scope than its counterpart in the existing Act. Section 4(a) of the existing Act applies only to repairers' and artisans' liens whereas section 4(a) of the proposed Act applies to all types of liens, charges or interests given by statute or rule of law.

Section 4(b)

The wording of section 4(b) has been modified in order to provide clarity.

Section 4(c)

Section 4(c) of the proposed Act is different from its counterpart in the existing Act in that it does not have the effect of excluding from the scope of the Act fees payable as compensation for professional services. Accordingly the assignment of the accounts receivable of an accountant would be included within the scope of the Act.

Section 4(f)

Section 4(f) of the proposed Act maintains the policy contained in section 4(f) of the existing Act, but, along with the definitions of "instrument" and "security", provides clarification with respect to a difficult issue that arises in the context of the cross-over between personal and real property law.

Both Acts treat a "security" and an "instrument" as separate types of collateral and define their scope to include negotiable debt obligations. The effect of exempting securities and instruments from the exclusion of transfers of rights to payment that arise in connection with an interest in real property is that the Act applies to a security interest taken in a security or instrument even though that security or instrument is in turn secured in whole or in part by a security interest in real property. Accordingly, if D, the holder of a negotiable debt obligation in the form of a security or instrument that is secured by an interest in the real property of the issuer, gives a security interest in the debt obligation, the Act would apply to the security agreement creating the security interest. Of course, to the extent that the debt obligation is contained in a land mortgage to which The Land Titles Act R.S.S.1978, c-L-5, applies, The Personal Property Security Act should not apply. The definitions of the terms "instrument" and "security" contained in the proposed Act are designed to produce this effect. Under these definitions, where a debt obligation is contained in a writing that provides for or creates a mortgage or charge in respect of an interest in land that is specifically identified in the writing, the writing is not an instrument or a security and the rights associated with it are not governed by The Personal Property Security Act. However, where the writing does not provide that the obligation is secured by a mortgage or charge on an identified interest in land, the writing may well be a security or instrument if the other requirements of these definitions have been met. This is so even though the obligations represented by the writing are secured by an interest in land.

The relevance of this distinction is displayed in the following scenario:

Company A issues a "negotiable" debenture which provides for a security interest in all of the company's assets. Some of the assets are mortgages on real property. The debenture is a security or an instrument. There are, of course, two separate "rights to payment" in this scenario. The right to payment under a mortgage between Company A and a mortgagor (hereinafter referred to as the mortgage obligation) and a right to payment under the debenture (hereinafter referred to as the debenture obligation). There is no doubt that the mortgage obligation is a right to payment that arises in connection with an interest in land; but in addition, the debenture obligation may be seen as arising in connection with an interest in land.

Assume that the debenture is bought by Company B which then given as collateral for a loan from Company C. Company C registers a financing statement in the Personal Property Registry. Company B, acting fraudulently, transfers possession of the debenture to Company D as collateral for a loan made by Company D. Company B becomes insolvent and pays neither Company C nor Company D.

Neither Company C nor Company D would think to attempt to register an interest as mortgagee on the title to the mortgaged property. What they assume they have is a negotiable security or instrument representing a debt obligation of Company A that, however, in the background is secured by interests in Company A's property, including the real property mortgages. In practical terms, Company C and Company D are most likely to treat the security as personal property and will expect the priority structure for security interests in personal property to apply.

However, the effect of the common law rule that the security follows the debt results in Company B, Company C and Company D all having interests in the land encumbered by the mortgage since, in effect, the debenture is secured by the obligation contained in the mortgage. This being the case, The Land Titles Act might apply as well.

This potential conflict between the priority structures of the two systems is addressed in section 69 of the proposed Act. In effect, supremacy is given to The Personal Property Security Act. It is most unlikely that this approach will threaten the integrity of the land titles system. The business community that deals in negotiable personal property does not expect that rights in that property will be governed by The Land Titles Act.

It will be noted that section 4(f) of the proposed Act is different from the existing Act in a very important respect. The new section 4(f) excludes from the Act the creation or transfer of an interest in rental payments whereas the existing Act makes it clear that such transactions are within the scope of the Act. It should also be noted that there is no equivalent in the proposed Act to section 22 of the existing Act.

Prior to the enactment of the existing Act, the law applicable to priority disputes involving successive assignees of rental payments was contained in The Choses in Actions Act, R.S.S. 1978, c. c-11, and the rules of equity. (It is accurate to say that the courts had not yet decided whether the applicable priority rules were those implicit in The Choses in Actions Act or those established in the case of Dearle v. Hall (1823), 3 Russ. 1, [1824-1834] All E.R. Rep. 28, 38 E.R. 475. In this regard see, Gordon v. Gordon [1924] 1 W.W.R. 903 (Sask. C.A.)). The drafters of the existing Act apparently decided that clarity in this area of the law was required and decided to provide this through The Personal Property Security Act. (See sections 4(f)(i) and 22.) While consideration was given to amending The Land Titles Act for this purpose, this approach was not taken because it was the policy of the Department of the Attorney General at that time not to violate the conceptual purity of The Land Titles Act by making it applicable to transactions that at common law are treated as involving personal property.

While on the whole the priority structure of The Personal Property Security Act works well in the context of successive claims to rental payments as personal property, there is one major difficulty that it cannot address adequately. This difficulty arises in a situation where an assignee of the rental payments as personalty is in competition with someone claiming the rental payments under a transaction (whether registered or not and whether entered into before or after the assignment of the payments as personalty) to which The Land Titles Act applies. For example, the priority structure of The Personal Property Security Act does not apply where a prior transferee or mortgagee of the leased land is in competition with a subsequent assignee of the rental payments. (See generally, United Dominion Investments v. Morguard Trust [1986] 1 W.W.R. 78 (Sask. C.A.).)

It is for this reason that the Commission has decided to recommend that assignments of rental payments be treated as transfers of an interest in land for the limited purpose of determining priorities among successive assignees of the payments. It has concluded that commercial predictability is more important that the conceptual purity of The Land Titles Act. Implementation of this policy decision necessitates an amendment to The Land Titles Act to add the following new provisions:

The Land Titles Act is amended by including after section 124.2 the following section:

124.3(1) For the purposes of this section,

(a) "assignee" includes a secured party.

(b) "assignment" includes a security interest.

(c) "rents" means amounts payable or to be paid under a lease, including a lease as provided in section 134, and amounts payable for an easement.

(d) tenant includes the owner of an easement.

(2) For the purposes of determining priority among successive holders of rights in rents, an interest arising under an assignment of rents is deemed to be an interest in land, and a caveat may be filed in respect of an assignment of rents for this purpose.

(3) A tenant may pay rents to the grantor of the lease or the easement

(a) before the tenant receives a notice in writing that

(i) states that the rents payable or to become payable by the tenant are to be made to an identified assignee of the rents, and

(ii) identifies the lease or easement agreement under which the rents are payable or will become payable, or

(b) after

(i) the tenant requests the assignee to furnish proof of the assignment, and

(ii) the assignee fails to furnish proof within 15 days from the date of the request.

(4) Payment by a tenant to an assignee in accordance with a notice referred to in subsection (2) discharges the obligation of the tenant to the extent of the payment.

(5) An assignment of rights in rents to which The Personal Property Security Act R.S.S. 1978, c. P-6.1 applied, is deemed to have been registered by caveat against the title to the land under lease, and such registration continues for a period of six months after the date this section comes into force.

Section 145(2) of The Land Titles Act is amended by adding to the beginning of the section the following:

(2) Subject to section 124.3...

It will be noted that under the proposed new section, an assignment of rentals is deemed to be an interest in land only for the purposes of this section and not for all purposes. Accordingly, The Choses in Actions Act applies to all matters not addressed in section 124.3.

The Commission has decided to extend the priority system of section 124.3 to include payments under easements. For the purposes of priorities among successive assignees there is no reason to distinguish between rentals and payments for easement rights.

The protection given to the tenant or owner under subsections (3) and (4) is identical to that given to an account debtor under section 41 of The Personal Property Security Act.

Section 4(i)

Section 4(i) of the proposed Act is narrower in scope than its counterpart, section 4(i) in the existing Act with the result that the proposed Act will extend to a wider range of claims for damages than does the existing Act. The decision was made to limit the exclusion to an interest in a right to damages in tort because claims or judgments for damages in other contexts often involve assets that are of commercial value. For example, a claim to damages for breach of a contract may well be an asset that is offered as security by a plaintiff.

Section 4(k)

This section has no counterpart in the existing Act. It is designed to be a temporary measure only. The problem that it addresses results from the practice of chartered banks claiming that section 178 Bank Act security interests held by them are also security interests governed by The Personal Property Security Act.

Section 178 of the Bank Act R.S.C. 1985, c. B-1 establishes a system for secured lending available only to the chartered banks. This legislation dictates the circumstances in which banks may make secured loans, the type of collateral that they may take as security, the priority position of a section 178 security vis-a-vis certain other claimants to the collateral, a registry for section 178 security interests and the rights of a bank to realize on its security in the event of default by a borrower. The origins of this system dates back to the middle of the last century. The current structure of the system dates from 1923 when a registration requirement was added. While many changes have been made to the system over the years, it remains fundamentally the same system as that established over sixty years ago. Indeed, the conceptual basis for this type of security interest and some of the actual wording of section 178 of the Bank Act originated in legislation enacted in 1859!

Chartered banks are not required to use the section 178 system to secure loans made by them. They, like any other lender, are free to use the provincially created systems. As a result, the banks have two systems of personal property security law available to them. Should a bank decide to employ section 178 to secure a loan, there is the real chance that the collateral in which it has taken its

security interest is encumbered by a provincially created security interest granted to another chartered bank or to a lender or financer such as a credit union, trust company, sales finance company or government lending institution (federal or provincial) that is subject to provincial personal property security law.

Prior to the enactment of The Personal Property Security Act there was very little conflict between the two systems. This resulted from the fact that both section 178 of the Bank Act and provincially created personal property security systems functioned on the same conceptual basis. Both systems adopted the common law approach: priority goes to the secured party who first obtains his interest in the collateral: nemo dat quod habet. In both cases, the nemo dat rule was made subject to registration requirements. In other words, in order for the secured party who first obtains his interest in the collateral to be able to assert priority he must have met the registration requirements of the applicable system. Accordingly, if such secured party held a section 178 security interest, failure to register as required by section 178(4) rendered its interest "void" as against, inter alia, subsequent mortgagees and other creditors. By the same token, if the secured party held a provincial chattel mortgage, failure to register as required by provincial law rendered the mortgage "void" as against specified persons, including mortgagees. The courts held that the holder of a section 178 security interest is a "mortgagee" within the protection of provincial law.

This is not to say that there was no potential for conflict between the two systems. However, the incidents of conflict remained low largely because of the narrower scope of section 88 of the Bank Act (as noted above section 178 is broader in scope) and because of the dominance of the banks in the business and agricultural lending fields.

The expanded scope of section 178, the greatly expanded competitiveness of the business lending market and, above all, the enactment of The Personal Property Security Act have changed the picture dramatically. From the legal perspective, what is new to the picture is that generally the priority structure of The Personal Property Security Act is not based on the common law principle of nemo dat. Under the basic priority rule of the Act, priority goes to the secured party who is first to register or otherwise perfect its security interest. It has this priority even though it may have acquired its interest long after competing creditors acquired their interests in the same collateral. In addition, The Personal Property Security Act prescribes a highly refined and integrated priority structure designed to rationalize this area of provincial law. This aspect of the new legislation was inferentially recognized in Rogerson Lumber Co. Ltd. v. Four Seasons Chalet Ltd. (1980) 113 D.L.R.(3d) 671, where the Ontario Court of Appeal held that an unregistered Personal Property Security Act security interest was not subordinated to a subsequent section 178 security interest, since a Bank Act security interest was not one of the types of interests falling within the protection of the provincial legislation.

The effect of the Rogerson Lumber decision was to encourage the banks to employ methods to bring section 178 security interests within the scope and

protection of The Personal Property Security Acts. The two methods in common use are: (1) registration of a financing statement in the Personal Property Registry in the hope of being able to argue, should it be to the benefit of the bank, that its section 178 security interest thereby becomes as well a Personal Property Security Act security interest; (2) taking duplicate section 178 and Personal Property Security Act security interests in the same collateral to secure the same debt in the hope of being able to choose at the appropriate time whichever system of law is most advantageous to the bank.

There is some Saskatchewan judicial recognition of the efficacy of the first method in Bank of Montreal v. Pulsar Ventures Inc. and City of Moose Jaw [1988] 1 W.W.R. 250 (per Vancise J. at p. 258). [For an analysis of this case in the light of the decision of the Ontario Court of Appeal in Rogerson Lumber, see R. Cuming "The Relationship Between Personal Property Security Acts and Section 178 of the Bank Act: Federal Paramountcy and Provincial Legislative Policy" (1988) 14 C.B.L.J. 315.]

The efficacy of the second method received support in dicta of the Saskatchewan Court of Appeal in Birch Hills Credit Union v. Canadian Imperial Bank of Commerce [1988] 5 W.W.R. 592. The alternative view is that while there is nothing to prevent a bank from taking duplicate section 178 and Personal Property Security Act security interests, ultimately, it must choose one or other of the two inconsistent systems of law as governing its rights. The open question is as to what constitutes this election of rights. (See generally, R. Cuming and R. Wood, "Compatibility of Federal and Provincial Personal Property Security Law" (1986) 65 Can B Rev (Spec. issue) 267 at 287-289.)

While there remains doubt with respect to some situations, it is possible to state with some certainty the basic priority rules that apply to conflicts between section 178 and the (existing) Personal Property Security Act security interests in the same collateral.

1. If the section 178 security interest is taken first in time and is registered under section 178(4) it will have priority over a subsequent Personal Property Security Act security interest in the same collateral, even though the Personal Property Security Act interest has been registered first. The priority structure of The Personal Property Security Act cannot adversely affect the priority given to a section 178 security interest given by the Bank Act.

2. If the section 178 security interest is taken first but is not registered under section 178(4) of the Bank Act, it is void as against a subsequently created Personal Property Security Act security interest in the same collateral, whether or not the Personal Property Security Act security interest is registered as required by The Personal Property Security Act. This result

is dictated by the Bank Act and provincial law cannot change the result.

3. If a section 178 security interest and a Personal Property Security Act security interest come into existence at the same time (for example under after-acquired property clauses in the respective security agreements) priority goes to the first of the two secured parties to obtain a security agreement. (This assumes that the section 178 security interest is registered as required by section 178(4)). This conclusion was reached by the Saskatchewan Court of Appeal in Bank of Montreal v. Pulsar Ventures Inc. and City of Moose Jaw (noted above).

4. If a Personal Property Security Act security interest is taken first but not registered or otherwise perfected under The Personal Property Security Act, it is unsettled under current law whether or not it has priority over a subsequently acquired section 178 Bank Act security interest in the same collateral where the bank has registered a financing statement in The Personal Property Security Act and claims that its section 178 security interest is also a Personal Property Security Act security interest.

5. It remains to be determined by the courts what legal position a bank occupies when it takes both a section 178 and a Personal Property Security Act security interest in the same collateral and registers that interest in The Personal Property Security Act. It is suggested that the court will insist that the bank elect between the two sources of applicable law.

It is understandable that the banks should want to convince the courts that section 178 security interests are also Personal Property Security Act security interests. What they want is the reversal of the Rogerson Lumber decision so that when they take section 178 security interests in collateral they can determine by a check of the Personal Property Registry whether or not the collateral is subject to a prior provincial security interest to which they will be subject.

The consequence of treating section 178 security interests as Personal Property Security Act security interests is that the banks can have the benefits of The Personal Property Security Act priority system without being bound by it. They hold federally created section 178 security interests and provincial law cannot adversely affect the rights given to the banks by federal law. In the result, the elaborate and highly integrated priority structure of The Personal Property Security Act would be fragmented and applied only piecemeal where section 178 security interests are involved.

As a matter of general public policy, every reasonable effort should be made to reduce the risk to the banks by giving to them the benefits of the provincial

registry systems. However, it is the opinion of the Commission that these benefits should not be surrendered by the Saskatchewan Legislature without gaining in return a change in federal law that would introduce a greater measure of federal-provincial rationalization in this area of the law and thereby put both provincial lenders and federal banks on a roughly equal legal (and therefore competitive) basis.

Changes in both federal and provincial personal property security law and in business practices which have occurred in recent years have made it necessary to take a very different approach to matters arising from the interface between section 178 of the Bank Act and provincial Personal Property Security Acts. No longer is it sufficient to take the position that section 178 of the Bank Act is a matter solely for the banks and the Federal Department of Finance. What is required is a concerted federal-provincial effort to harmonize Canadian personal property security law so as to facilitate secured lending and to remove distortions in this market produced by differences in federal and provincial law.

Saskatchewan has invested a great deal of effort in the modernization of provincial personal property security law. It has developed a system which is without doubt the most sophisticated and efficient in the world. This system is compatible with Personal Property Security Act systems in other provinces. Recent efforts in Western Canada may well result in the provinces of British Columbia, Alberta, Saskatchewan and Manitoba, the Yukon Territory and the Northwest Territories all having substantially uniform personal property security law. The newly enacted Ontario Personal Property Security Act has reformed the law of that province so as to adopt many of the innovative features contained in the current Saskatchewan Personal Property Security Act and in the WCPPSA. It is also relevant to note that the Personal Property Security Acts are conceptually and functionally compatible with the personal property security law (Article 9 of the Uniform Commercial Code) of all states of the United States other than Louisiana. This may be an important feature of transborder business transactions occurring after the "free trade" agreement comes into full effect.

Clearly, therefore, the provinces have provided the leadership for reform in this important area of the law. It is time that the Federal Government recognize the inadequacies of section 178 of the Bank Act and take such steps as will be necessary to reduce the disruption and legal uncertainty that this antiquated system produces. In so doing it must work in concert with provincial governments to ensure that the necessary symmetry between federal and provincial personal property security law is brought about. The Commission recommends to the Minister of Justice for Saskatchewan that he take measures to encourage the Minister of Finance for Canada to take such steps.

There are at least three possible options available to the Federal Government:

(1) Total repeal of section 178 of the Bank Act thereby requiring the banks to function within the same legal framework

applicable to all other lenders and financiers with which the banks are in direct competition.

(2) Amendment to section 178 of the Bank Act so as to make it inapplicable to transactions occurring in provinces that have enacted a Personal Property Security Act or the equivalent of this legislation.

(3) The enactment of a Federal Personal Property Security Act applicable to all federally created security interests. This legislation would be conceptually and functionally compatible with provincial Personal Property Security Acts.

Of the three options noted above, the second would appear to be the one that has the greatest chance of being implemented in the immediate future.

However, until federal and provincial personal property security legislation is harmonized, interim measures must be taken to prevent confusion and unfairness resulting from overlap between the two systems. It is for this reason that the Commission has included section 4(k) in the proposed Act. The effect of this provision is that a chartered bank holding a section 178 Bank Act security interest cannot assert rights under The Personal Property Security Act on the basis that its section 178 security interest is also a security interest within The Personal Property Security Act, but not subject to those features of The Personal Property Security Act that are inconsistent with section 178 of the Bank Act.

(existing Act)

5(1) Except where otherwise provided in this Act, the validity, perfection and effect of perfection or non-perfection of:

(a) a security interest in goods; and

(b) a possessory security interest in securities, instruments, negotiable documents of title, money and chattel paper;

is determined by the law of the jurisdiction where the collateral is situated when the security interest attaches.

(2) A security interest in goods perfected, under the law of the jurisdiction in which the goods are situated when the security interest attaches, before the goods are brought into the province, continues perfected in the province:

(a) as against a buyer in good faith who acquires an interest in the goods after they are brought into the province, if

the security interest is perfected in the province prior to the acquisition; and

(b) as against all other persons, if the security interest is perfected in the province:

(i) within 60 days after the day the goods are brought into the province;

(ii) within 15 days after the day the secured party receives notice that the goods have been brought into the province; or

(iii) prior to the day that perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached;

whichever is earliest.

(3) A security interest that is not perfected as provided in subsection (2) may be otherwise perfected under this Act.

(4) Where a security interest mentioned in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated when the security interest attached before being brought into the province, it may be perfected under this Act.

* * *

(proposed Act)

5(1) Subject to this Act, the validity, perfection and effect of perfection or non-perfection of

(a) a security interest in goods, or

(b) a possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper,

is governed by the law of the jurisdiction where the collateral is situated when the security interest attaches.

(2) For the purposes of subsection (1), an uncertified security is situated where the records of the clearing corporation are kept.

(3) A security interest in goods perfected under the law of the jurisdiction in which the goods are situated at the time the security interest attaches but before the goods are brought into the Province continues perfected in the Province if it is perfected in the Province,

(a) not later than 60 days after the goods are brought into the Province,

(b) not later that 15 days after the day the secured party has knowledge that the goods have been brought into the Province, or

(c) before perfection ceases under the law of the jurisdiction in which the goods were situated when the security interest attached,

whichever is earliest, but the security interest is subordinate to the interest of a buyer or lessee of the goods who acquires the interest without knowledge of the security interest and before it is perfected in the Province under section 24 or 25.

(4) A security interest that is not perfected as provided in subsection (3) may be otherwise perfected in the Province under this Act.

(5) Where a security interest referred to in subsection (1) is not perfected under the law of the jurisdiction in which the collateral was situated at the time the security interest attached and before the collateral was brought into the Province, it may be perfected under this Act.

COMMENT

There are a few substantive changes in this section.

Subsection (2) has no counterpart in the existing Act. It is designed to provide a choice of law rule for uncertified securities.

A structural change has been made in subsection (3) in order to replace the concept of a security interest being "perfected as against" with the concept of a perfected security interest being subordinated to other specified interests.

There is a difference between subsection 2(a) of the existing Act and its counterpart in subsection (3) in the proposed Act. Under the existing Act, a temporarily perfected security interest in goods brought into the province is

subordinated to "a good faith buyer who acquires an interest in the goods" before the security interest is perfected by registration or possession of the goods in the province. Under the proposed Act, such a security interest is subordinated to a buyer or lessee who acquires an interest without knowledge of the security interest and before it is perfected by registration or possession of the collateral. The proposed provision extends the protection to a lessee. However, it requires that the buyer or lessee be without knowledge of the security interest. In this respect, the proposed section is somewhat more restrictive than the existing Act that requires only good faith. The approach contained in the proposed section 5(3) is more consistent with the approach contained in section 30(5) of the existing and proposed Act.

(existing Act)

6(1) Subject to section 7, if the parties to a security agreement creating a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and the goods are removed to the other jurisdiction within 30 days after the security interest attached for purposes other than transportation through the other jurisdiction, the validity, perfection and effect of perfection or non-perfection of the security interest are determined by the law of the other jurisdiction.

(2). Where the jurisdiction to which the goods are removed is other than this province and the goods are later brought into this province, the security interest in the goods is deemed to be one to which subsection 5(2) applies if it had been perfected under the law of the jurisdiction to which the goods were removed.

* * *

(proposed Act)

6(1) Subject to section 7,

(a) if the parties to a security agreement that creates a security interest in goods in one jurisdiction understand at the time the security interest attaches that the goods will be kept in another jurisdiction, and

(b) if the goods are removed to the other jurisdiction, for purposes other than transportation through the other jurisdiction, not later than 30 days after the security interest attaches

the validity, perfection and effect of perfection or non-perfection of the security interest is determined by the law of the other jurisdiction.

(2) If the other jurisdiction referred to in subsection (1) is not this Province, and the goods are later brought into this Province, the security interest in the goods is deemed to be a security interest to which subsection 5(3) applies if it was perfected under the law of the jurisdiction to which the goods were removed.

COMMENT

There are a few small stylistic changes in this section which, however, result in no change in the law.

(existing Act)

7(1) The validity, perfection and effect of perfection or non-perfection of:

(a) a security interest in intangibles or in goods which are of a type that are normally used in more than one jurisdiction, if such goods are classified as equipment or as inventory leased or held for lease by a debtor to others; and

(b) a non-possessory security interest in securities, instruments, negotiable documents of title, money and chattel paper;

are governed by the law of the jurisdiction where the debtor is located when the security interest attaches.

(2) For the purposes of this section, a debtor is deemed to be located at his place of business if he has one, at his chief executive office if he has more than one place of business, and otherwise at his place of residence.

(3) When a debtor changes his location to another jurisdiction, a perfected security interest mentioned in subsection (1) continues perfected in this jurisdiction if it is perfected in the new jurisdiction:

(a) within 60 days after the day the debtor changes his location;

(b) within 15 days after the day the secured party received notice that the debtor has changed his location; or

(c) prior to the day that perfection ceases under the law of the first jurisdiction;

whichever is earliest.

(4) If the jurisdiction in which the debtor is deemed to be located under this section does not provide for public registration or recording of security interests mentioned in subsection (1) and the collateral is not in the possession of the secured party, any security interest in the collateral which is not perfected under this Act is deemed to be an unperfected security interest in relation to any interests in the collateral acquired by a person in this province.

(5) A security interest that is not perfected as provided in subsection (3) or is deemed to be unperfected in this province under subsection (4) may be otherwise perfected under this Act.

(6) Notwithstanding section 6 and subsection (1) of this section, the validity, perfection and effect of perfection or non-perfection of security interest which is created by a debtor who has an interest in minerals or the like, including oil and gas, before extraction and which attaches thereto upon extraction, or attaches to an account resulting from the sale thereof at the wellhead or minehead, is governed by the law of the jurisdiction in which the wellhead or minehead is located.

* * *

(proposed Act)

7(1) For the purposes of this section, a debtor is located at

(a) the place of business, if any, of the debtor,

(b) the executive office of the debtor, if the debtor has more than one place of business, and

(c) the principal residence of the debtor, if the debtor has no place of business.

(2) The validity, perfection and effect of perfection or non-perfection of

(a) a security interest in

(i) an intangible, or

(ii) goods that are of a type that are normally used in more than one jurisdiction, if the goods are equipment or inventory leased or held for lease by a debtor to others, and

(b) a non-possessory security interest in a security, an instrument, a negotiable document of title, money and chattel paper,

is governed by the law, including the conflict of law rules, of the jurisdiction where the debtor is located when the security interest attaches.

(3) Where a debtor relocates to another jurisdiction or transfers an interest in the collateral to a person located in another jurisdiction, a perfected security interest perfected in accordance with the law applicable as provided in subsection (2) continues perfected in the province if it is perfected in the other jurisdiction

(a) not later than 60 days from the day the debtor relocates or transfers an interest in the collateral to a person located in the other jurisdiction,

(b) not later than 15 days from the day the secured party has knowledge that the debtor has relocated or transferred an interest in the collateral to a person located in the other jurisdiction, or

(c) prior to the day that perfection ceases under the law of the first jurisdiction,

whichever is earliest.

(4) If the law governing the perfection of a security interest referred to in subsection (2) or (3) does not provide for public registration or recording of such security interest or a notice relating to it, and the collateral is not in the possession of the secured party, the security interest is subordinate to

(a) an interest in an account payable in the Province,

(b) an interest in goods, a security, an instrument, a negotiable document of title, money or chattel paper acquired when the collateral was situated in the Province,

unless it is perfected under this Act before the interest referred to in paragraph (a) or (b) arises.

(5) A security interest referred to in subsection (4) may be otherwise perfected under this Act.

(6) Notwithstanding section 6 and subsection (2) of this section, the validity, perfection and effect of perfection or non-perfection of a security interest in minerals or in an account resulting from the sale of the minerals at the minehead

(a) that is provided for in a security agreement executed before the minerals are extracted, and

(b) that attaches to the minerals upon extraction or attaches to an account upon sale of the minerals,

is governed by the law of the jurisdiction in which the minehead is located.

(7) For the purposes of subsection (6), "minerals" includes petroleum and gas and "minehead" includes "wellhead".

COMMENT

Section 7(1)(c) of the proposed Act is somewhat more definitive that section 7(2) of the existing Act in that it provides for the situation where the debtor has more than one residence.

Section 7(1) of the proposed Act, unlike its counterpart in the existing Act, makes it clear that a reference to the law of the jurisdiction where the debtor is located is to the entire law, including the conflict of laws rules, of the jurisdiction. This provision is necessary in order to accommodate those jurisdictions that apply their domestic law to registration and priority issues associated with the types of collateral mentioned in the section only when the collateral is located in that jurisdiction or, in the case of intangibles, when it is collectable in the jurisdiction.

Subsection (4) of the existing Act employs the concept of a security interest being "unperfected in relation to any other interest in the collateral acquired by a person in this province". Subsection (4) of the proposed Act is somewhat more refined in its approach to the issued involved. It provides that the security interest is "subordinate to" specified interests. It focuses on the locus of the

interest rather than on the question as to whether or not the interest was acquired by a person in the province. Under the existing Act it is not clear whether the acquisition or the person acquiring the interest (or both) must be in the province at the relevant time.

Subsection (6) of the proposed Act has been redrafted to provide greater clarity.

(existing Act)

8(1) Except as otherwise provided in this Act, when goods, other than those mentioned in subsection (2), securities, instruments, negotiable documents of title, money and chattel paper are dealt with in two or more jurisdictions and a conflict exists between the priority rules of the jurisdictions:

(a) the priority rules of the last jurisdiction, in which the collateral was dealt with in such a way as to give rise to an interest in conflict, prevail, if all interests in conflict were perfected by registration;

(b) the priority rules of the last jurisdiction, in which a conflicting possessory security interest in the collateral was taken, prevail.

(2) Subject to subsection 7(4), when intangibles or goods which are of a type that are normally used in more than one jurisdiction, if such goods are equipment or inventory leased or held for lease by a debtor to others, are dealt with in two or more jurisdictions and a conflict exists between the priority rules of the jurisdictions, the priority rules of the jurisdiction, in which the debtor is located when the last dealing occurred which gave rise to the conflict, prevail.

(3) For the purposes of this section, collateral is dealt with when it is:

(a) purchased;

(b) seized under judicial process; or

(c) becomes subject to a non-consensual lien or charge.

(4) Notwithstanding sections 5, 6, and 7 and subsection (1) and (2) of this section:

(a) all procedural issues involved in the enforcement of the rights of a secured party against collateral other than intangibles are governed by the law of the jurisdiction in which the collateral is located at the time of the exercise of such rights;

(b) all procedural issues involved in the enforcement of the rights of a secured party against intangibles are governed by the law of the forum;

(c) all substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

* * *

(proposed Act)

8(1) Notwithstanding sections 5, 6, and 7,

(a) procedural issues involved in the enforcement of the rights of a secured party against collateral other than intangibles are governed by the law of the jurisdiction in which the collateral is located when the rights are exercised,

(b) subject to paragraph (c), procedural issues involved in the enforcement of the rights of a secured party against intangibles are governed by the law of the forum, and

(c) substantive issues involved in the enforcement of the rights of a secured party against collateral are governed by the proper law of the contract between the secured party and the debtor.

(2) For the proposes of sections 5, 6, and 7, a security interest is perfected under the law of a jurisdiction if the secured party has complied with the law of the jurisdiction with respect to the creation and continuance of a security interest with the result that the security interest has a status in relation to other secured parties, buyers and judgment creditors and a trustee in bankruptcy of the debtor similar to that of an equivalent security interest created and perfected under this Act.

COMMENT

It will be noted that the proposed Act does not contain a counterpart of section 8(1) of the existing Act. This subsection was designed to deal with situations where Saskatchewan courts are required to determine the applicable law when there are two security interests in the same collateral, each of which is valid under one of the choice of law rules specified in sections 5 and 7. The Commission has decided not to include this provision in the proposed Act since it provides a solution only in a limited range of situations. On its wording, the provision deals only with conflicting security interests. It does not deal with a situation where a security interest valid under the choice of law rule of section 5 is in conflict with the interests of a buyer or execution creditor of the debtor valid under the laws of some other jurisdiction. The Commission concluded that the complexities involved in drafting a provision to deal with all types of interests that might come into conflict with security interests were too numerous and the incidence of these conflicts too small to warrant statutory treatment.

There is no counterpart in the existing Act to subsection (2) of the proposed Act. The Commission concluded that until all jurisdictions in Canada adopt Personal Property Security Acts situations will arise in which Saskatchewan courts will be required to determine in the context of an unreformed personal property security law of a jurisdiction whether or not a security interest is perfected. This being the case, it is important that the term "perfected" as it is used in sections 5 to 7 be defined in terms that relate to a non-Personal Property Security Act system.

PART II

VALIDITY OF SECURITY AGREEMENTS AND RIGHTS OF PARTIES

(existing and proposed Act)

9 Except as otherwise provided in this or any other Act, a security agreement is effective according to its terms.

COMMENT

There is no change in this section.

(existing Act)

10(1) No security interest is enforceable against a third party unless:

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement that contains a description of the collateral which enables the type or kind of collateral taken under the security agreement to be distinguished from types or kinds of collateral which are not collateral under the security agreement, and, in the case of a security interest taken in all of the debtor's present and after-acquired property, a statement indicating that a security interest has been taken in all of the debtor's present and after-acquired property is sufficient.

(2) A security interest in proceeds is not unenforceable against a third party by reason only that the security agreement does not contain a description of the proceeds as required by clause (1)(b).

* * *

(proposed Act)

10(1) Subject to subsection (2), a security agreement is only enforceable against a third party where

(a) the collateral is in the possession of the secured party, or

(b) the debtor has signed a security agreement that contains

(i) a description of the collateral by item or kind,

(ii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property, or

(iii) a statement that a security interest is taken in all of the debtor's present and after-acquired personal property except specified items or kinds of personal property.

(2) For the purposes of clause (1)(a), a secured party is deemed not to have taken possession of collateral that is in the apparent possession or control of the debtor or the debtor's agent.

(3) A description is inadequate for the purposes of clause (1)(b) if it describes the collateral as consumer goods or equipment without further reference to the item or kind of collateral.

(4) A description of collateral as inventory is adequate for the purposes of clause (1)(b) only while it is held by the debtor as inventory.

(5) A security interest in proceeds is enforceable against a third party whether or not the security agreement contains a description of the proceeds.

COMMENT

There are some significant differences between section 10 of the existing Act and its counterpart in the proposed Act. Most of these differences are designed to provide somewhat greater flexibility with respect to collateral descriptions in security agreements. It should be noted that the policy of the existing Act to have the same collateral description requirements for financing statements as for security agreements has been maintained with the result that, for the most part, what is contained in this comment applies to collateral description requirements in the regulations under the proposed Act.

The existing Act makes reference to description of collateral by "type or kind". Presumably the drafters of the existing Act used the term "type" to refer to the species of collateral and the term "kind" to refer to the genus of collateral.

In other words, it is sufficient to refer to the genus (kind) "farm equipment" or to the species (type) "tractor" in a generic collateral description in a security agreement or financing statement. The Commission has concluded that this distinction is unnecessarily subtle and has decided to use the term "kind" to refer to generic descriptions.

Under the proposed section 10(1)(b)(i), collateral may be described generically (by kind) or specifically (by item). Under certain circumstances (examined elsewhere in this report) goods collateral must be described specifically by serial number in the prescribed manner in a financing statement. However, there is no requirement that goods be described specifically in a security agreement; a generic description is adequate in all cases.

As is the case with the existing Act, it is possible under the proposed Act to use an all present and after-acquired property clause if the agreement so provides. However, what the existing Act may not permit but the proposed Act clearly permits is to describe collateral by subtraction. In other words, the agreement can provide for a security interest in all present and after acquired property of the debtor other than specified items or kinds of collateral.

A major source of confusion and controversy has arisen in connection with the use of the categories of goods collateral provided by the Act as descriptors of collateral in security agreements and financing statements. The Saskatchewan Court of Appeal held in one of the first cases involving the Act to come before the Court, Touche Ross Ltd. v. The Royal Bank of Canada [1984] 3 W.W.R. 259, that it was sufficient compliance with the regulations dealing with collateral descriptions on financing statements to use the term "equipment". It follows from this ruling that it is acceptable to use the term "inventory" and, perhaps even the term "consumer goods". Experience under the existing Act since 1984 has suggested that this approach compromises the underlying policy of the Act to provide useful and reliable information to persons who are seeking to determine what property of a debtor is subject to a security agreement.

The Commission has not overlooked the fact that under section 18 a person wishing to know the scope of a security agreement has the power to get all the necessary details directly from the secured party and that, consequently, collateral description requirements in security agreements are not crucial for disclosure purposes. However, the Commission has concluded that the policy of applying the same collateral description requirements for security agreements as apply to financing statements is a good one and should be retained. Implementation of this policy results in the formulation of rules that may have more significance in the context of disclosure of information through the Registry than disclosure of information on a financing statement.

The proposed Act contains detailed instructions as to the circumstances in which the categories of collateral under the Act can be used in a collateral description in the security agreement. The terms "consumer goods" and "equipment" used by themselves are not sufficient; the "kind" of goods must be

described. However, the term "inventory" may be used by itself as the collateral description in the security agreement, but only while the collateral is held as "inventory" by the debtor. As soon as the use is changed from "inventory" to "consumer goods" or "equipment", the security agreement become unenforceable and the security interest provided for in it becomes unattached.

The reason why the proposed legislation refuses to recognize the terms "consumer goods" and "equipment" and gives only limited recognition of the term "inventory" as collateral descriptions in security agreements and financing statements is that these terms are not descriptive of kinds of goods; they are descriptive of the context within which the goods are held at any particular time by the debtor. As such they provide in some circumstances very little useful information as to the kind of goods taken as collateral under a security agreement. What the proposed Act requires is a generic description of the goods not a label that indicates the context within which the goods were being held by the debtor at the date the security interest attached. Under the Act, goods are classified as "consumer goods", "inventory" or "equipment". Consumer goods are goods that are "used or acquired for use" primarily for personal, family or household purposes". Inventory is "goods held for sale or lease, goods furnished under a contract of service, raw materials or work in progress or materials used or consumed in a business". Goods that are neither "consumer goods" nor "inventory" are "equipment". It can be seen that a collateral description of goods as "consumer goods", "inventory" or "equipment" says nothing about whether the goods are automobiles, bicycles, horses, clothing or any other kind of goods. They are not generic descriptions of the goods.

In addition to the fact that the goods categories of the Act are not particularly useful in informing searching parties as to the collateral taken under a security agreement is the fact that the use of these categories can be misleading. For example, the cows of a dairy farmer are "equipment" under the categorization system of the Act. Since they are not "consumer goods" nor "inventory" they must be "equipment". At the same time, a hay bailer and a milking machine used by the dairy farmer are also "equipment". Under the existing Act, as a result of the Touche Ross decision, a security agreement and a financing statement relating to a security interest in the cows, milking machine and hay bailer need contain only the word "equipment" as the collateral description. The Commission has concluded that most users of the system would not appreciate these subtleties and some may be misled by them. They would assume that the word "equipment" indicates a security interest in the milking machine and the hay bailer, but would not appreciate that it included the cows.

The limited concession with respect to the use of the term "inventory" is dictated by practical considerations. It is very common for a security agreement to provide for a security interest in a wide range of goods held by the debtor as "inventory". It might be thought unduly onerous to require the secured party in such a situation to list all of the kinds of collateral in a debtor's inventory if, for example, the debtor carried on the business of a retail department store. Consequently, the proposed Act allows the use of this term as a descriptor in both

a security agreement and a financing statement, but only so long as the goods are held as "inventory". If goods, originally held as "inventory", are later held as "consumer goods" or "equipment", a collateral description of the goods as "inventory" in a security agreement or financing statement becomes inadequate with the attendant loss of perfection.

(existing Act)

11 The secured party shall deliver a copy of the security agreement to the debtor within than 10 days after its execution and, if the secured party fails to do so after a request by the debtor, a judge may, on application by the debtor, make an order for the delivery of a copy to the debtor and may make any order as to costs that he considers just.

* * *

(proposed Act)

11 Where a security agreement is in writing, the secured party shall deliver a copy of the security agreement to the debtor not later than 10 days after the execution of the security agreement and, if the secured party fails to do so after a request by the debtor, a Court may, on application by the debtor, make an order for the delivery of a copy to the debtor.

COMMENT

A few minor changes have been made in this section. The section is confined in its operation to situations where there is a written security agreement.

The application is made to the Court of Queen's Bench. The form of the application is dictated by the Queen's Bench Rules of Court.

(existing Act)

12(1) A security interest attaches when:

(a) value is given;

(b) the debtor has rights in the collateral; and

(c) except for the purpose of enforcing *inter partes* rights of the parties to the security agreement, it becomes enforceable within the meaning of section 10;

unless the parties intend it to attach at a later time, in which case it attaches in accordance with the intentions of the parties.

(2) For the purposes of subsection (1), a debtor has rights:

(a) in goods purchased by him under an agreement to sell, when he obtains possession of them pursuant to the sales contract;

(b) in goods leased to him, hired by him or delivered to him under a consignment, when he obtains possession of them pursuant to the lease, hiring agreement or consignment.

(3) For the purposes of subsection (1), a debtor has no rights in:

(a) crops until they become growing crops;

(b) the young of animals until they are conceived;

(c) oil, gas or other minerals until they are extracted; or

(d) timber until it is cut.

* * *

(proposed Act)

12(1) A security interest attaches when

(a) value is given,

(b) the debtor has rights in the collateral, and

(c) except for the purpose of enforcing rights as between the parties to the security agreement, the security interest becomes enforceable within the meaning of section 10,

unless the parties have specifically agreed to postpone the time of attachment, in which case it attaches at the time specified in the agreement.

(2) For the purposes of subsection (1)(b) and without limiting other rights, if any, which the debtor may have, a lessee under a lease for a term of more than one year or a consignee under a

commercial consignment has rights in the goods when the lessee or consignee obtains possession of them pursuant to the lease or consignment.

(3) For the purposes of subsection (1), a debtor has no rights in

(a) crops until they become growing crops,

(b) the young of animals until they are conceived,

(c) oil , gas or minerals until they are extracted, or

(d) trees, other than crops, until they are severed.

COMMENT

There are a few changes in this section designed to provide clarification.

The final flush of subsection (1) makes it clear that any intention on the part of the parties that the security interest will attach at a coincidence of items (a) to (c) must be contained in a "specific agreement". In other words, this intention cannot be a matter of inference drawn from conduct.

The Commission has concluded that the reference to rights arising under an agreement to sell in section 12(2)(a) of the existing Act is not necessary since such a transaction is in substance a security agreement with the result that the buyer is deemed by the Act to be the owner of the goods.

Since certain types of trees are "crops" under the definition of the term in section 2(1)(i), it is necessary to limit the operation of subsection 3(d) to trees other than crops.

(existing Act)

13(1) When a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12 without specific appropriation by the debtor.

(2) No security interest in crops attaches under an after-acquired property clause in a security agreement unless the crops are grown within one year after the security agreement has been executed, except that a security interest in crops that is give in conjunction with a lease, purchase or mortgage of land may,

if the parties so agree, attach to crops to be grown on the land concerned during the term of such lease, purchase or mortgage.

* * *

(proposed Act)

13(1) Subject to section 12 and subsection (2), where a security agreement provides for a security interest in after-acquired property, the security interest attaches in accordance with section 12 without specific appropriation by the debtor.

(2) A security interest does not attach to after-acquired property that is crops that become growing crops more than one year after the security agreement has been entered into, except that a security interest in crops that is given in conjunction with a lease, agreement for sale or mortgage of land may, if the parties so agree, attach to crops to be grown on the land concerned during the term of the lease, agreement for sale purchase or mortgage.

COMMENT

Only a few minor stylistic changes have been made in this provision.

(existing Act)

14(1) A security interest may secure future advances whether or not the advances are given pursuant to an obligation in the security agreement.

(2) No obligation to make future advances is binding on a secured party if the collateral has been seized, attached or charged under circumstances described in clause 20(1)(b) or (c), and the secured party receives notice of this fact.

* * *

(proposed Act)

14(1) A security agreement may provide for future advances.

(2) Unless the parties otherwise agree, an obligation owing to a debtor to make future advances is not binding on a secured party if the collateral has been seized, attached, charged or made subject to an equitable execution under circumstances described in subclauses 20(1)(a)(i) and (ii), and the secured party has knowledge of this fact before making the advances.

COMMENT

There are a few minor changes in this section. The reference to obligatory future advances has been removed from subsection (1) since the definition of "advances" in section 2(1)(t) includes both obligatory and discretionary advances.

Subsection (2) of the proposed Act deals only with obligations owing to the debtor. The corresponding provision of the existing Act applies to any obligation of the secured party. Situations may arise in which the secured party has obligated itself to a third party to make advances to or on behalf of the debtor. For example, a letter of credit contains an obligation of the issuer to pay the face amount of the letter to someone other than the debtor. The Commission has concluded that such an obligation should not be affected by judgment enforcement proceedings against collateral of the secured party. The secured party should be free to honour its commitment to pay the face amount of the letter of credit and to tack that amount so as to have priority over an intervening judgment creditor.

(existing Act)

15 Where a seller retains a purchase-money security interest in goods, all sales law including, but without limiting the generality of the foregoing, *The Sale of Goods Act*, *The Consumer Products Warranties Act* and *The Agricultural Implements Act*, where applicable, governs the sale, including any disclaimer, limitation or modification of express or implied conditions and warranties.

* * *

(proposed Act)

15 Where a seller retains a purchase money security interest in goods, the law relating to contracts of sale, including a disclaimer, limitation or modification of the seller's performance obligations with respect to the goods, governs the sale.

COMMENT

A few minor changes have been made in this provision. The provision has been reformulated so as to be more general in its statement of the principle involved.

(existing Act)

16 Where a security agreement provides that the secured party may accelerate payment or performance by the debtor when the secured party deems himself insecure or decides that the collateral is in jeopardy, that provision is to be construed to mean that the secured party has the right to do so only if he has commercially reasonable grounds to believe that the prospect of payment or performance is or is about to be impaired or that the collateral is or is about to be placed in jeopardy.

* * *

(proposed Act)

16 Where a security agreement provides that a secured party may accelerate payment or performance by the debtor when the secured party considers that the collateral is in jeopardy or that the secured party is or believes himself insecure, the provision shall be construed to mean that the secured party has the right to do so only if the secured party believes and has commercially reasonable grounds to believe that the collateral is or is about to be placed in jeopardy or that the prospect of payment or performance is or is about to be impaired.

COMMENT

Only a few minor stylistic changes have been made in this provision.

(existing Act)

17(1) A secured party shall use reasonable care in the custody and preservation of collateral in his possession, and, unless otherwise agreed, in the case of an instrument, a security or chattel paper, reasonable care includes taking necessary steps to preserve rights against other persons.

(2) Unless otherwise agreed, where collateral is in the secured party's possession:

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in the custody and preservation of the collateral, are hargeable to the debtor and are secured by the collateral;

(b) the risk of loss or damage, except where caused by the negligence of the secured party, is on the debtor to the extent of any deficiency in any insurance coverage;

(c) the secured party may hold as additional security any increase or profits, except money, received from the collateral, and shall apply any money so received, unless remitted to the debtor, immediately upon its receipt in reduction of the obligation secured;

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled.

(3) The secured party may create a security interest in the collateral upon terms that do not impair the debtor's rights under Part V.

(4) A secured party does not lose his security interest for failing to meet any obligations imposed by subsection (1) or (2).

(5) A secured party may use the collateral:

(a) in the manner and to the extent provided in the security agreement;

(b) for the purpose of preserving the collateral or its value; or

(c) pursuant to an order of:

(i) the court before which a question relating to the collateral is being heard; or

(ii) a judge upon application with notice to all persons concerned.

* * *

(proposed Act)

17(1) In this section, "secured party" includes a receiver.

(2) A secured party shall use reasonable care in the custody and preservation of collateral in the possession of the secured party, and, unless the parties otherwise agree, in the case of an instrument, a security or chattel paper, reasonable care includes taking necessary steps to preserve rights against other persons.

(3) Unless the parties otherwise agree, where collateral is in the secured party's possession,

(a) reasonable expenses, including the cost of insurance and payment of taxes or other charges incurred in obtaining and maintaining possession of the collateral, are chargeable to the debtor and are secured by the collateral,

(b) the risk of loss or damage, except where caused by the negligence of the secured party is on the debtor to the extent of any deficiency in any insurance coverage,

(c) the secured party may hold as additional security any increase or profits, except money, resulting from the collateral, and shall apply any money so received, unless remitted to the debtor, immediately upon its receipt in reduction of the obligation secured, and

(d) the secured party shall keep the collateral identifiable, but fungible collateral may be commingled.

(4) Subject to subsection (1), a secured party may use the collateral

(a) in the manner and to the extent provided in the security agreement,

(b) for the purpose of preserving the collateral or its value, or

(c) pursuant to an order of a court.

COMMENT

The differences between section 17 of the proposed Act and its counterpart in the existing Act are not of major practical or conceptual significance. A number

of stylistic changes have been made. The only substantive change is that section 17 of the proposed Act contains no equivalent of subsections (3) and (4) of the existing Act.

The conceptual difficulty associated with existing section 17(3) is that it is not clear what is involved. Is the secured party merely creating a security interest in his security interest in the collateral; is he merely assigning his security interest to someone else; or is the secured party empowered to act as agent of the debtor to create additional security interests in the collateral? If it is the former, then the section is redundant, since the secured party always has a right to give a security interest in his property (i.e. the security interest in the collateral). There is no need to state this in a section of the Act. If it is the latter, one must question what policy is being served by giving such power to the secured party.

The only argument that can be made for the section is that it is designed to make it clear that a "repledge" of collateral (e.g. securities) in the possession of the secured party is not a violation of section 17(1) merely because the secured party has thereby surrendered possession of it and has therefore not used "reasonable care in the custody and preservation of" the collateral.

The source of the idea is section 9-207(2)(e) of the Uniform Commercial Code which allows the secured party to "repledge the collateral upon terms which do not impair the debtor's right to redeem it." Clearly the American provision refers to the former since it applies only to a "repledge". Professor Gilmore points out that the provision merely codifies pre-existing US law on the topic. It was apparently induced by a series of US cases decided in the 1930's dealing with the effect of a repledge of securities by stock brokers. One of the difficulties that arose in the context of these cases was that the secured party would repledge the collateral for more than the amount owing by the debtor to him. When this happened, the debtor would be required to pay more than the debt owing by him to the secured party in order to redeem his interest. As a result some of the American courts concluded that in such cases, the repledge was a conversion of the debtor's interest in the collateral.

The decision was made to delete entirely the equivalent of section 17(3) because of the confusion it causes and because it was decided that if the secured party wants to repledge the collateral (as distinct from giving a non-possessory security interest in it) he should provide so in an agreement between the parties. Then the debtor knows what difficulties he might be encountering when this occurs.

The Commission concluded that subsection (4) of the existing Act is redundant since the consequences of non-compliance with section 17 are spelled out in section 65 of the proposed Act.

(existing Act)

18(1) A debtor, creditor, sheriff or person with a legal or equitable interest in the collateral may, by a demand in writing, containing an address for reply and served on the secured party, require the secured party to send or deliver to him at the address for reply:

(a) a statement in writing of the amount of the indebtedness and the terms of payment thereof as of the date specified in the demand;

(b) a written approval or correction of the itemized list of the collateral attached to the demand as of the date specified in the demand;

(c) a written approval or correction of the amount of indebtedness and of the terms of payment thereof as of the date specified in the demand;

(d) a copy of the security agreement and amendments thereto.

(2) The demand mentioned in subsection (1) may be served in accordance with subsection 67(1) or by registered mail addressed to the post office address of the secured party as it appears on the security agreement or financing statement.

(3) Where a demand is served in accordance with clause (1) (b) and where the secured party claims a security interest in all of a particular type of collateral in which the debtor has rights, he may so indicate in lieu of approving or correcting the itemized list of such collateral.

(4) The secured party shall reply to a demand served under subsection (1) within 10 days after it is served and if, without reasonable excuse, he fails to do so or his answer is incomplete or incorrect, the person who has served the demand is entitled, in addition to any other remedy provided by this Act, to apply to a judge for an order requiring the secured party to comply with the demand.

(5) Where a secured party fails to comply with an order granted under subsection (4), a judge, on application of the party who obtained the order, may:

(a) declare the security interest of the secured party void and order registration of the security interest removed from the registry; or

(b) make any order that he considers necessary to ensure compliance with the order granted under subsection (4).

(6) Where the person served with a demand under subsection (1) no longer has an interest in the obligation or collateral, he shall, within 10 days after it is served, disclose the name and address of any successor in interest known to him, and if, without reasonable excuse, he fails to do so or his reply is incomplete or incorrect, the person who has served the demand is entitled to the same remedies as provided in subsections (4) and (5).

(7) A successor in interest is deemed to be the secured party for the purposes of this section when he is served with a demand under subsection (1).

(8) Upon application of the secured party or in an application under subsection (4), a judge may:

(a) make any order that is reasonable and just, including an order exempting the secured party in whole or in part from complying with the demand, if the judge is satisfied that the person giving the demand, not being the debtor, is acting in bad faith and is seeking the information for other than ordinary commercial purposes; and

(b) make any order as to costs that he considers fair and reasonable.

(9) The secured party may require payment in advance of the charges prescribed for each reply to a demand under subsection (1), but the debtor is entitled to a reply without charge once every six months.

(10) The secured party is not required to provide a copy of any document registered in the registry.

* * *

(proposed Act)

18(1) The debtor, a creditor, a sheriff, a person with an interest in personal property of the debtor, or an authorized representative of any of them, may, by a demand in writing containing an address for reply and delivered to the secured party

(a) at his most recent address set forth in a registered financing statement or security agreement containing a description of personal property of the debtor,

(b) at a more recent address, or

(c) where there is no address as referred to in clause (a), at the current address of the secured party,

require the secured party to send or make available the information specified in subsection (2) to the person making the demand or, if the demand is made by the debtor, to any person at an address specified by the debtor.

(2) The information that may be demanded under subsection (1) may be any one or more of the following

(a) a copy of any security agreement providing for a security interest held by the secured party in the personal property of the debtor,

(b) a statement in writing of the amount of the indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand,

(c) a written approval or correction of an itemized list of personal property attached to the demand indicating which items are collateral as of the date specified in the demand,

(d) a written approval or correction of the amount of indebtedness and of the terms of payment of the indebtedness, as of the date specified in the demand,

(e) sufficient information as to the location of the security agreement or a copy of it to enable a person entitled to receive a copy of the security agreement to inspect it.

(3) A person with an interest in personal property of the debtor is entitled to make a demand under subsection (1) only with respect to a security agreement providing for a security interest in the property in which the person has an interest.

(4) The secured party, on demand of the person entitled to receive a copy of the security agreement under subsection (1), shall permit the person to inspect the security agreement of a copy of it during normal business hours at the location referred to in clause (2)(e).

(5) Where a demand is made in accordance to subsection (2)(c) and the secured party claims a security interest in all of the personal property of the debtor, in all the property of the

debtor other than a specified kind or item of property or in all of a specified kind of property of the debtor, the secured party may indicate this in lieu of approving or correcting the itemized list of the property.

(6) The secured party, other than a trustee under a trust indenture, shall reply to the demand made under subsections (2) or (4) not later than 10 days after the demand is made.

(7) A secured party who is a trustee under a trust indenture shall reply to the demand made under subsections (2) or (4) not later than 25 days after the demand is made.

(8) Where, without reasonable excuse, the secured party fails to comply with the demand within the time specified or in the case of a demand under subsection (1), the reply is incomplete or incorrect, the person making the demand, in addition to any other remedy provided by this Act, may apply to the court for an order requiring the secured party to comply with the demand.

(9) Where a person receiving a demand under subsection (2) or (4) no longer has an interest in the obligation or property of the debtor that is the subject of the demand, that person shall, not later than 10 days after receiving the demand, disclose the name and address of the immediate successor in interest and, if known, the latest successor in interest.

(10) Where, without reasonable excuse, the person receiving the demand fails to comply with subsection (9), the person making the demand, in addition to any other remedy provided in this Act, may apply to a court for an order requiring that person to comply with subsection (9).

(11) On application under subsection (8) or (10), the court may make an order requiring

(a) the secured party referred to in subsection (8) to comply with the demand referred to in that subsection, or

(b) the person referred to in subsection (9) to disclose the information referred to in that subsection.

(12) In an application under subsection (8),(10) or in a separate application, the court may make

(a) any order it considers necessary to ensure compliance with the demand, and

(b) in the case of an application under subsection (8), an order that, in the event of non-compliance with the order of the court to respond to the demand, the security interest of the secured party with respect to which the demand was made is unperfected or extinguished and that any related registration be discharged.

(13) On an application under subsection (8) or (10), or on an application of the secured party referred to in subsection (8) or the person referred to in subsection (9), the court, subject to section 65, may

(a) exempt the secured party or person receiving the demand in whole or in part from complying with subsection (1) or (9), other than with respect to a demand made by the debtor, or

(b) extend the time for compliance.

(14) A secured party who has replied to a demand referred to in subsection (1) is estopped, for the purposes of this Act, as against

(a) the person making the demand; or

(b) any other person who can reasonably be expected to rely on the reply,

to the extent that the person relied on the reply, from denying

(c) the accuracy of the information contained in the reply to the demand under clauses (2)(b), (c) or (d),

(d) that the copy of the security agreement provided in response to a demand under clause (2)(a) is a true copy of the security agreement required to be provided by clause (1)(a).

(15) A successor in interest referred to in subsection (9) is estopped, for the purposes of this Act, as against

(a) the person making the demand referred to in subsection (1) and

(b) any other person who can reasonably be expected to rely on the reply to the demand,

to the extent that the person has relied on the reply, from denying

(c) the accuracy of the information contained in the reply to the demand under clauses 2(b), (c) and (d), and

(d) that the copy of the security agreement that was provided in response to a demand under clause (1)(a) is a true copy of the security agreement required to be provided by subsection (1)(a).

(16) A successor in interest referred to in subsection (9) is not estopped under subsection (15) where

(a) the person making the demand knows the identity and address of the successor in interest, or

(b) prior to the demand, a financing change statement has been registered as provided in section 51 disclosing the successor in interest as the secured party.

(17) The person to whom a demand is made under this section may require payment in advance of a fee in the amount prescribed for each demand, but the debtor is entitled to a reply without charge once every six months.

(18) A secured party who receives a demand that purports to be made by a person entitled to make it under subsection (1) may act as if the person is, in fact, entitled to make the demand unless the secured party know that the person is not entitled to make it.

COMMENT

A large number of changes have been made in this section. Most of them are designed to clarify matters; however, some of them introduce new policies.

Subsection (1) (proposed Act)

This subsection contains the substance of subsections (1) and (2) of the existing Act. Subsection (1) of the proposed Act allows the debtor to require that the information be sent to an address specified by the debtor. This will generally be the address of a third party who does not have the right to demand information directly from the secured party.

Subsection (2) (proposed Act)

This subsection contains the substance of subsection (1)(a)-(d) of the existing Act. The subsection allows the person making the demand to require that the respondent provide information as to the location of the security agreement or a copy of it so as to permit inspection of it. In some cases, it is more efficient for the inquiring party to inspect the agreement than to await the delivery of a copy through the mail. (See also subsection (4).)

Subsection (3) (proposed Act)

There is no equivalent to this subsection in the existing Act. The purpose of the subsection is to limit the scope of inquiry available to a person with an interest in collateral of the debtor. In other words, it is designed to prevent "fishing expeditions". For example, a person with an interest in one automobile owned by the debtor is limited to information concerning a security agreement that provides for a security interest in that automobile. He cannot demand information concerning all security agreements between the debtor and the secured party. In effect subsection (3) gives to the secured party to whom a demand for information has been directed by a person claiming an interest in property of the debtor, a right to demand from the inquiring person information as to that property so that the secured party can respond only with respect to a security interest in that property.

Subsection (4) (proposed Act)

(See comments to subsection (2), supra.)

Subsection (5) (proposed Act)

This is the direct equivalent of subsection (3) of the existing Act.

Subsections (6), (7) and (8) (proposed Act)

Unlike subsection (4) of the existing Act, subsections (6) and (7) of the proposed Act draw a distinction between time allowed for a response by a trustee under a trust indenture and the time allowed for responses by other persons. A trustee is given 25 days instead of the usual 10 days, since it is often the case that the trustee must inquire from the debenture holders what is the state of accounts between the holders and the debtors.

Subsections (9) and (10) (proposed Act)

Subsection (6) of the existing Act contains equivalent provisions.

Subsections (11), (12) and (13) (proposed Act)

Subsection (8) of the existing Act contains equivalent provisions.

Subsections (14) and (15) (proposed Act)

There is no direct equivalent to these provisions in the existing Act. The question arises in the context of the existing Act as to what is the remedy for an inquiring party when the person responding to the inquiry gives incorrect information. There is a strong argument to be made that the remedy is recovery of damages under section 64(2). (See section 18(4).)

The Commission has concluded that a more appropriate remedy in these circumstances is estoppel. It is more appropriate in that it avoids complex litigation that would otherwise be necessary, particularly when the inquiring party has entered into other transactions on the assumption that the information supplied was accurate. Estoppel is the more perfect remedy in that it avoids complex issues of proof of actual damages and provides stability in business transactions. It is also the remedy that would be available at common law. It should be noted that the estoppel operates in favour of not only the person making the demand, but as well any other person who can reasonably be expected to rely on the reply. However, it functions only to the extent that there has been reliance in fact.

A successor in interest is estopped by the representations of the person to whom the demand was made under subsection (1) unless the person making the demand knew or should have known that the demand should have been directed to the successor in interest rather than the original secured party.

Subsection (18) (proposed Act)

There is no equivalent to this provision in the existing Act. The purpose of the subsection is to protect lending institutions from actions brought by debtor customers claiming damages for breach of confidence through the release of confidential business information to unauthorized persons.

PROPOSED ACT S. 19 | EXISTING ACT S. 19, 20(1)

PART III

PERFECTION AND PRIORITIES

(existing and proposed Act)

19 A security interest is perfected when

(a) it has attached, and

(b) all steps required for perfection under this Act have been completed,

regardless of the order of occurrence.

COMMENT

There are no changes in this provision.

(existing Act)

20(1) An unperfected security interest is subordinate to the interest of:

(a) a person who has a perfected security interest or who is otherwise entitled to priority under this Act;

(b) a person who causes the collateral to be seized under legal process, including execution, attachment or garnishment, or that obtains a charging order or equitable execution affecting the collateral;

(c) a sheriff who has seized or has obtained a right to the collateral under *The Creditors' Relief Act*;

(d) a representative of creditors, but only for the purposes of enforcing the rights of persons mentioned in clause (b), and a trustee in bankruptcy;

(e) a transferee who is not a secured party and who acquires his interest for value without notice of the security interest and before it is perfected;

(i) in documents of title, securities, instruments or goods, where the transferee receives delivery of the collateral;

(ii) in intangibles other than accounts;

(iii) in accounts acquired through a transaction not otherwise governed by this Act;

(iv) in chattel paper acquired through a transaction not otherwise governed by this Act, where the transferee receives possession of the chattel paper.

(2) A perfected security interest is subordinate to the rights of persons mentioned in clauses (1)(b) to (d), except to the extent that the security interest secures:

(a) advances made before the interests of such persons arise;

(b) advances made before the secured party receives notice of the interest of such persons;

(c) reasonable costs incurred and expenses made by the secured party for the protection, maintenance, preservation or repair of the collateral.

* * *

(proposed Act)

20 A security interest

(a) in collateral is subordinate to the interest of

(i) a person who causes the collateral to be seized under legal process to enforce a judgment, including execution, attachment or garnishment, or who has obtained a charging order or equitable execution affecting or relating to the collateral,

(ii) a sheriff who has seized or has obtained a right to collateral under The Creditors' Relief Act,

(iii) a judgment creditor entitled by law to participate in the distribution of property or its proceeds seized under legal process as provided in The Creditors' Relief Act, and

(iv) a representative of creditors, but only for the purposes of enforcing the rights of persons referred to in subclause (i),

if that security interest is unperfected at the time

(v) the interest of the persons mentioned in (i), (ii), or (iv) arises, or

(vi) the judgment creditor mentioned in (iii) delivers a writ of execution or certificate to the sheriff under The Creditors' Relief Act.

(b) in collateral is not effective against

(i) a trustee in bankruptcy if the security interest is unperfected at the date of bankruptcy or

(ii) a liquidator appointed under the Winding-up Act (Canada) if the security interest is unperfected at the date that the winding-up order is made,

(c) in goods, chattel paper, a security, a document of title, an instrument or an intangible or money is subordinate to the interest of a transferee who

(i) acquires the interest under a transaction that is not a security agreement,

(ii) gives value, and

(iii) acquires the interest without knowledge of the security interest before the security interest is perfected.

COMMENT

While a number of significant structural changes have been made in this section, only a few policy changes are involved.

Section 20(1)(a) of the existing Act deals with priorities between a perfected and an unperfected security interest. This matter is addressed in section 35(1)(b) of the proposed Act. The effect of this change is to limit the scope of section 20 to priority disputes involving interests other than security interests.

Section 20(a)(ii) of the proposed Act clarifies the policy of subsection 20(1)(c) of the existing Act by mentioning persons who are entitled to share in a distribution under The Creditors' Relief Act.

There is an important structural change in proposed section 20(a). It can be argued that, given the wording of existing section 20(1), a security interest that is perfected after one of the competing interests mentioned in the section arises has priority, since the section deals only with a competition between an unperfected security interest and one of more of these interests and not between a security interest that is perfected, albeit after the other interest arises, and the other interest. While it is most unlikely that a Saskatchewan court would put this interpretation on the section, because to do so would be to ignore the policy of the section, the Commission has decided to remove the basis for the argument. The proposed Act subordinates an unperfected security interest to the specified interest if the security interest is unperfected at the time that such interest arises.

Section 20(b) of the proposed Act makes an unperfected security interest ineffective against a liquidator appointed under the federal Winding-up Act. While a liquidator is not in every respect the direct equivalent of a trustee in bankruptcy, under section 22 of the Winding-up Act, a winding-up order ends the power of unsecured creditors to enforce money judgments against the assets of the corporation subject to the order. In effect, the liquidator occupies the position of a representative of creditors of an insolvent corporation and should be able to assert the rights of those creditors to attack an unperfected security interest that are vested in him or her when the winding-up order is made. The proposed Act implements this policy.

It will be noted that under section 20(b) of the proposed Act, an unperfected security interest is stated to be "not effective against" a trustee or liquidator. The change from "subordinate to the interests of" to "not effective against" is designed to remove any suggestion that the trustee must demonstrate that he or she has an interest greater than that of assignee of the property rights of the bankrupt. In effect, the change codifies the decision of the Saskatchewan Court of Appeal in International Harvester Credit Corp. v. Bell's Dairy [1986] 6 W.W.R. 161.

Perhaps the most significant policy change reflected in the proposed Act relates to the position of a transferee of goods. Under the existing Act, in order for a transferee to have priority over an unperfected security interest in the goods, he or she, inter alia, must have received possession of the goods. The Commission has concluded that this requirement has the potential for creating unfairness in some situations. Consider the following scenario:

> A offers to sell his automobile to B. A, acting fraudulently, does not disclose to B that the automobile is subject to a security interest given by A to SP.

Before buying the automobile, B obtains a search result from the Personal Property Registry. However, SP's security interest in the automobile is not perfected by registration (of by any other manner) at the date that B obtained the search results. B assumes that the automobile is free from any encumbrances and decides to buy it. The contract of purchase is executed on June 1, but the parties agree that B would return the next day with the purchase price and would take delivery of the automobile at that time. On June 2, before B takes delivery, SP registers a financing statement and perfects its security interest in the automobile.

Under the existing Act, SP would have priority since B did not meet all of the requirements of section 20(1)(e)(iv) (i.e. take possession of the automobile) before SP perfected its security interest. Under section 20(c)(iii) of the proposed Act, B would have priority since transfer of possession is not a requirement for priority.

The substance of section 20(2) of the existing Act appears as section 35(6) of the proposed Act.

(existing Act)

There is no equivalent to this provision in the existing Act.

* * *

(proposed Act)

21 **Where the interest of a lessor under a lease for a term of more than one year or of a consignor under a commercial consignment is subordinated to the interest of another person as a result of not effective against a judgment creditor under section 20(a) or a trustee or liquidator under section 20(b), the lessor or consignor is deemed , as against the lessee or consignee, as the case may be, to have suffered, immediately before the seizure of the leased or consigned goods or the date of the bankruptcy or winding-up order, damages in an amount equal to**

(a) **the value of the leased or consigned goods at the date of the seizure, bankruptcy, or winding-up order, and**

(b) **the amount of loss, other than that referred to in paragraph (a), resulting from the termination of the lease or consignment.**

COMMENT

Section 21 of the proposed Act is designed to clarify the rights of lessors and consignors under non-security transactions that are brought within the registration and priority provisions of the Act. The section places a lessor or consignor in a position that parallels that of a secured party in the event that the debtor becomes a bankrupt.

Under section 20(b), an unperfected security interest is not effective against the debtor's execution creditors who have seized the collateral or the debtor's trustee in bankruptcy. The explanation provided with respect to the position of a lessor or consignor where the lessee or consignee becomes a bankruptcy, applies as well when the leased or consigned equipment is seized under execution. Where the holder of a true security interest is involved, the trustee will exercise the rights granted by section 20(b) and will take the collateral as part of the estate of the debtor. While the secured creditor loses its collateral, as a creditor, it will have a claim against the estate to the full amount owing by the debtor under the security agreement and will receive a share of the estate calculated as a percentage of this amount. However, where a lessor under a lease for a term or more than one year or a commercial consignee is involved, considerable uncertainty exists as to the amount, if any, recoverable from a lessee or consignee's estate in bankruptcy.

As is the case where a true security interest is involved, the trustee of a lessee or consignee will assert his rights under section 20(b) and take the leased or consigned "collateral" as part of the estate of the lessee or consignee. The lessor or consignor is then left in the position of proving as an unsecured creditor in the lessee's or consignee's bankruptcy, the loss resulting from the breach of the lease or consignment contract. However, the lessor or consignor faces difficulties not faced by a secured party claiming as an unsecured creditor for the amount owing by the bankrupt debtor under the security agreement. In the first place, it is not clear that, in the absence of specific provision in the lease or consignment, the lessee's or consignee's bankruptcy is a breach of the contract. More significantly, the trustee may well take the position that the causa causans of the loss suffered by the lessor or consignee is not the bankruptcy of the lessee or consignee, but the failure on the part of the lessor or consignor to perfect its security interest. If the lessor or consignor had registered his or her interest as required by The Personal Property Security Act, the damages recoverable in the bankruptcy proceedings would be reduced by the residual value of the leased or consigned goods.

It may well be that both of these difficulties can be overcome by including provisions in the lease or consignment dealing specifically with the quantum of loss recoverable by the lessor or consignor in the event of bankruptcy by the lessee or consignor. However, it is the position of the Commission that the Legislature should not leave the matter to the uncertainties of litigation.

Under section 21 the lessor or consignor is deemed to have suffered immediately prior to the date of bankruptcy the ordinary measure of damages for breach of contract plus damages in an amount equal to the value of the leased or consigned goods at the date of the bankruptcy. In other words, the section circumvents the argument of the trustee that the lessor or consignor suffers damages to the value of the lost property not as a result of the bankruptcy but as a result of failure to perfect.

Since section 21 prescribes a special rule applicable only in the event of bankruptcy, the question as to the constitutionality of the provision inevitably arises. It is the Commission's view that the section cannot be attacked as being beyond the legislative jurisdiction of the Saskatchewan Legislature.

Section 21 is an adjunct to section 20(b). The latter gives rights to a trustee that are beyond those given by the Bankruptcy Act. The effect of section 21 is to limit the scope of section 20. The Saskatchewan Court of Appeal decided in Touche Ross Ltd. v. Paccar Financial Services Ltd, [1989] 3 W.W.R. 481, that the Legislature has the legislative jurisdiction to enact section 20(b), therefore it must certainly have the power to limit the effect of the section. This is the sole function of section 21.

It is relevant to note that section 21 does not extend to the other two types of deemed security agreements referred to in section 3(2): a transfer of an account and a transfer of chattel paper. The Commission has concluded that where the asset (the account or chattel paper) is transferred to the deemed secured party in a transaction under which the entire interest is vested in the transferee, there is no longer any connection between the transferee and the transferor to justify giving a statutory claim against the bankrupt's estate in bankruptcy. In any event there exists a well-recognized method through which the transferor can protect itself. If the sale of the account or chattel paper provides for recourse against the transferor in the event of non-payment by the account debtor or debtor under the chattel paper contract, the transferor has the basis for a claim in the bankruptcy of the transferee for the amount that the account debtor or debtor under the chattel paper contract has been required to pay to the trustee.

(existing Act)

21 A purchase-money security interest in:

(a) collateral, other than intangibles, that is registered within 15 days after the day the debtor obtains possession of the collateral;

(b) intangibles that is registered within 15 days after the day the security interest attaches;

has priority over the interest of a person mentioned in clauses 20(1)(b) to (d).

* * *

(proposed Act)

22(1) A purchase money security interest in

(a) collateral, other than an intangible, that is perfected not later than 15 days after the day

(i) the debtor obtains possession of the collateral, or

(ii) a third party, at the request of the debtor, obtains possession of the collateral,

whichever is earlier, or

(b) an intangible that is perfected not later than 15 days from the day the security interest attaches,

has priority over the interest of a person mentioned in clause 20(1)(a) or (b).

(2) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by the debtor, the debtor does not obtain possession of the goods until the debtor or a third party at the request of the debtor obtains actual possession of the goods or a document of title to the goods, whichever is earlier.

COMMENT

There are only two minor changes in this provision. Section 22 of the proposed Act provides clarification for situations where someone other than the debtor acquires possession of the collateral.

(existing Act)

22 A security interest in rental payments is subordinate to the interest of a person who acquires, without fraud under a transaction to which *The Land Titles Act* applies, an interest in the lease providing for the rental payments.

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* * *

(proposed Act)

There is no equivalent to this provision in the proposed Act.

COMMENT

The decision to have priority rights of successive claimants determined under a proposed new provision to be included in The Land Titles Act (see supra, pages 66-68, Comment to section 4(f)) eliminates the need for this type of provision in the proposed Personal Property Security Act.

(existing Act)

23(1) If a security interest is originally perfected in a way permitted under this Act and is again perfected in some other way under this Act without an intermediate period when it is unperfected, the security interest is deemed to be perfected continuously for the purposes of this Act, and is deemed, for the purposes of section 35, to be continuously perfected in the way in which it was originally perfected.

(2) An assignee of a security interest succeeds insofar as its perfection is concerned to the position of the assignor at the time of the assignment.

* * *

(proposed Act)

23(1) If a security interest is originally perfected under this Act and is again perfected in some other way under this Act without an intermediate period when it is unperfected, the security interest is continuously perfected for the purposes of this Act.

(2) A transferee of a security interest has the same priority with respect to perfection of the security interest as the transferor had at the time of the transfer.

COMMENT

The changes in this section are purely structural. The reference in section 23 of the existing Act to the method of perfection for the purposes of section 35 has been deleted and removed to section 35(2) of the proposed Act.

(existing Act)

24(1) Subject to section 19, possession of the collateral by the secured party, or on his behalf by a person other than the debtor or the debtor's agent, perfects a security interest in:

(a) chattel paper;

(b) goods;

(c) instruments;

(d) securities;

(e) negotiable documents of title;

(f) money;

but, subject to section 23, only while it is actually held as collateral.

(2) For the purposes of subsection (1), a secured party is deemed not to have taken or retained possession of collateral which is in the apparent possession or control of the debtor or the debtor's agent.

* * *

(proposed Act)

24(1) Subject to section 19, possession of the collateral by the secured party, or on the secured party's behalf by another person, perfects a security interest in

(a) chattel paper,

(b) goods,

(c) an instrument,

(d) a security,

(e) a negotiable document of title, and

(f) money,

except where possession is a result of seizure or repossession.

(2) For the purposes of subsection (1), a secured party does not have possession of collateral that is in the actual or apparent possession or control of the debtor or the debtor's agent.

(3) Where the collateral is a security, the transfer of which may be effected by an entry in the records of a clearing corporation as provided by the law applicable to the transfer of securities, a secured party is deemed to have taken possession of the security when the appropriate entries have been made in the records of the appropriate clearing corporation.

COMMENT

There are two changes in this provision. The first is the addition of subsection (3) to provide for deemed perfection by possession where the collateral is an uncertified security. The second is an addition to subsection (1) which codifies the decision of the Saskatchewan Court of Appeal in Bank of Nova Scotia v. Royal Bank of Canada and Farm-rite Equipment Ltd. (1987), 58 Sask. R. 304.

There was initially a division of opinion on the question whether a secured party can seize collateral from the debtor and then rely on the possession thus acquired as perfection by possession for the purposes of section 24(1). With some exceptions, early Ontario decisions tended to the view that perfection by repossession (seizure) was valid. The matter was settled in Saskatchewan by the Court of Appeal in the Farm-rite case, which reached the opposite conclusion and held that seizure of the goods on default is not sufficient to constitute perfection by possession. More recent Ontario decisions have adopted this approach. (See Royal Trust Corp. of Can. v. No. 7 Honda Sales Ltd. (1988), 8 P.P.S.A.C. 238 (Ont. Div. Ct.).) Section 22 of the new Ontario Personal Property Security Act, S.O. 1989, c. 16 reverses this decision by providing that "possession or repossession of the collateral by the secured party ... perfects a security interest in" specified types of collateral.

On the surface, it might appear that possession acquired through seizure ought to be treated as possession sufficient to permit perfection under section 24. If the function of section 24 is to ensure that the third parties are informed of the existence of the security interest, then possession by the secured party, however

acquired, would serve this goal. But when the matter is considered in a broader context, the wisdom of this approach is not so apparent.

There is a fundamental conceptual difference between perfection by possession and seizure after default. In the case of the former, the debtor has agreed to give possession of the collateral over to the secured party in order to permit the secured party to perfect its security interest. Seizure is the involuntary taking of the collateral from debtor by the secured party as a result of default by the debtor.

The practical difficulties associated with treating seizure as perfection by possession are no less significant. The effect of the approach would be to encourage secured creditors who have neglected to register or who have not properly registered a financing statement, to attempt to grab the collateral at the last moment immediately prior to bankruptcy. Such situations are fraught with potential for precipitous action and potential breaches of the peace. It will at least give rise to difficult questions of proof as to whether or not the secured party took possession before the petition for the receiving order or before the assignment was filed. This may involve the courts in hearing evidence on a sequence of events that occurred hours apart.

There are other potential difficulties. It is not clear what the outcome of the following scenarios would be:

> (i) Assume that SP1 takes a security interest and forgets to perfect it by registration. SP1 learns at a time when perfection by registration is not possible that the debtor is about to file an assignment in bankruptcy and attempts to seize the collateral. The debtor, however, has hidden the collateral, or will not allow the secured party on to his premises to seize the collateral (the debtor may have an interest in doing so because of antipathy toward the SP1 or because he may want his other creditors to have the benefit of the value of the collateral so that his will not be a non-assets bankruptcy). The result is either that the debtor is placed in the position of determining whether or not the secured party has a perfected security interest in the bankruptcy proceedings or that the secured party is deemed to have taken possession when it attempted to do so.
>
> (ii) Assume that SP1 takes a security interest and forgets to perfect it by registration. SP1 learns at a time when perfection by registration is not possible that the debtor is about to file an assignment and seizes the collateral. The debtor, however, is technically not in default under the security agreement. Is seizure in this context "perfection"? It is an "illegal seizure". What happens if a debtor who is in default offers immediately to reinstate and recover possession of the goods? Can the secured party refuse or must he become unperfected by surrender of the goods?

(iii) Assume that SP1 takes a security interest and forgets to perfect it by registration. SP2 takes a security interest in the same collateral and perfects it by registration. SP1 learns that the debtor is about to file an assignment and seizes the collateral. SP2 demands surrender of possession of the collateral by SP1 who refuses to do so. Is the "illegal" possession of SP1 sufficient to perfect its security interest and protect it against the trustee in bankruptcy? If SP1 surrenders the collateral to SP2, does its security interest cease to be perfected for the purposes of section 20(1)(b)?

The proposition that seizure is perfection by possession is plagued by a host of problems that would ultimately have to be settled by litigation and would frustrate a central policy of The Personal Property Security Act: to provide an orderly, consistent and predictable set of priority rules. Great flexibility and facility is given to secured parties when it comes to registration of security interests. It is very easy to comply with the requirements of the registry. There is little justification for importing into the system a conceptual bastard: perfection by seizure. This is particularly so when to do so brings with it the potential for difficult problems of proof, breaches of the peace, arbitrariness of result and, ultimately, the need to litigate in order to discover the applicable priority rules.

(existing Act)

25 Subject to section 19, registration of a financing statement perfects a security interest in any collateral but only during the period in which the registration of the financing statement or a financing change statement renewing the registration relating thereto is effective.

* * *

(proposed Act)

25 Subject to section 19, registration of a financing statement perfects a security interest in collateral.

COMMENT

The change in this provision is cosmetic. It was decided by the Commission that the "but" clause of the existing Act is redundant and should be removed, since it is not found in other provisions dealing with perfection by registration and its presence in section 25 might lead a court to conclude that a different approach should be taken when applying section 25.

(existing Act)

26(1) A security interest in instrument, securities or negotiable documents of title is a perfected security interest for the first 15 days after it attaches to the extent that it arises for new value given under a written security agreement.

(2) A security interest perfected under section 24 in:

(a) an instrument or securities that a secured party delivers to the debtor for the purpose of:

(i) ultimate sale or exchange;

(ii) presentation, collection or renewal; or

(iii) registration of transfer; or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of:

(i) ultimate sale or exchange;

(ii) loading, unloading, storing, shipping or transshipping; or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange;

remains perfected for the first 10 days after the collateral comes under the control of the debtor.

(3) After the expiration of the periods of time mentioned in sub-section (1) or (2), a security interest under this section is subject to the provisions of this Act for perfecting a security interest.

* * *

(proposed Act)

26(1) A security interest perfected under section 24 in

(a) an instrument or a security that a secured party delivers to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) presentation, collection or renewal, or

(iii) registration of a transfer, or

(b) a negotiable document of title or goods held by a bailee that are not covered by a negotiable document of title, which document of title or goods the secured party makes available to the debtor for the purpose of

(i) ultimate sale or exchange,

(ii) loading, unloading, storing, shipping or trans-shipping, or

(iii) manufacturing, processing, packaging or otherwise dealing with goods in a manner preliminary to their sale or exchange,

remains perfected, notwithstanding section 10, for the first 15 days after the collateral comes under the control of the debtor.

(2) After the expiration of the periods of time mentioned in subsection (1), a security interest referred to in this section is subject to the provisions of the Act relating to the perfection of a security interest.

COMMENT

The only change of significance to this provision is the deletion of subsection (1) of the existing Act. This provision originated in Article 9-304(1) of the Uniform Commercial Code which does not permit perfection of a security interest in instruments and securities by registration. The Commission concluded that since perfection by registration is permitted by section 25 there was no commercial necessity for an additional grace period for purchase money security interests in instruments, securities and negotiable documents of title.

(existing Act)

27(1) A security interest in goods in the possession of a bailee is perfected by:

(a) issuance of a document of title in the name of the secured party;

(b) a holding on behalf of the secured party pursuant to section 24;

(c) registration as to the goods; or

(d) perfection of a security interest in the negotiable document of title in cases where the bailee has issued a negotiable document of title covering the goods.

(2) The issuance of a negotiable document of title covering goods does not preclude any other security interest in the goods from arising during the period that the negotiable document of title is outstanding.

(3) A security interest in the negotiable document of title covering goods takes priority over a security interest in the goods otherwise perfected after the goods become covered by a negotiable document of title.

(4) Notwithstanding subsection (3), a perfected security interest in goods takes priority over the security interest in a negotiable document of title covering goods, where the security interest in the goods was registered at the time the security interest in the negotiable document of title was perfected.

* * *

(proposed Act)

27(1) Subject to section 19, a security interest in goods in the possession of a bailee is perfected by

(a) issue of a document of title by the bailee in the name of the secured party,

(b) perfection of a security interest in a negotiable document of title to the goods where the bailee has issued one,

(c) a holding on behalf of the secured party pursuant to section 24, or

(d) registration of a financing statement relating to the goods.

(2) The issue of a negotiable document of title covering goods does not preclude any other security interest in the goods from arising during the period that the negotiable document of title is outstanding.

(3) A security interest in a negotiable document of title covering goods takes priority over a security interest in goods otherwise perfected after the goods become covered by a negotiable document of title.

COMMENT

There is only one significant difference between this provision and its counterpart in the existing Act. The provision has no equivalent to section 27(4) of the existing Act.

Subsection (1)(b) of both Acts gives rise to an important conceptual issue. If, as the subsection appears to imply, a negotiable document of title is in law "the title" to the goods, the question arises as to whether or not any other security interest in the goods can be created in the goods otherwise than by taking a security interest in the negotiable document of title. Subsection (2) answers this question in the affirmative. By so doing, the subsection sets the stage for priority conflicts between security interests in goods perfected by perfection of security interests in a negotiable document of title covering the goods and security interests in goods perfected by registration. Subsection (3) contains a priority rule to deal with this situation. The operation of subsection (3) is displayed in the following scenarios. These scenarios are completely hypothetical since warehouse receipts are not treated as negotiable documents of title under Saskatchewan law. The only type of negotiable document of title recognized by the common law is a negotiable bill of lading. Bills of lading are not in common use in Saskatchewan. The reason for discussing the issue in the context of negotiable warehouse receipts is set out below.

(i) SP1 takes and perfects by registration a security interest in goods in the possession of D. Thereafter D delivers the goods to a warehouse company which issues a negotiable warehouse receipt to D covering the goods. D endorses the receipt to SP2 which takes possession of it to secured advances made to D.

SP1 has priority over SP2 as provided by section 35(1), since SP1 was first to perfect its security interest in the goods and since the goods were not covered by a negotiable document of title at the time that SP1 took its security interest in them.

(ii) D delivers goods to warehouse company which issues a negotiable warehouse receipt to D covering the goods. D gives a security interest in the goods to SP1 who registers a financing statement as provided by section 27(1)(d). Thereafter D endorses the receipt to SP2 which takes possession of it or registers a financing statement relating to it to secure advances made to D.

Under the existing section 27(4), priority is given to SP1 because it registered its security interest before SP2 took its security interest in the goods by perfecting a security interest in the negotiable document of title issued to D.

(iii) SP1 registers a financing statement which describes the collateral as all of the goods of D. D delivers goods to warehouse company which issues a negotiable warehouse receipt to D covering the goods. D endorses the receipt to SP2 which takes possession of it or registers a financing statement relating to it to secure advances made to D. Thereafter D gives a security interest in the goods to SP1.

Again, section 27(4) of the existing Act would give priority to SP1, but this time because it registered its financing statement before SP2 perfected its security interest in the negotiable document of title.

It will be seen that the effect of section 27(4) is to maintain, in the context of a priority dispute involving a security interest in goods and a security interest in a document of title to those goods, the priority structure prescribed by section 35. In other words, the integrity of the registry system is protected. It was presumably for this reason that it was included in the existing Act.

The negative aspect of subsection (4) is that it interferes with the use of negotiable documents of title as methods to create interests in goods. In other words, the subsection interferes with the assumption that title to goods is embodied in a negotiable document of title to those goods and that once a negotiable document of title has been issued, in order to ensure priority, a security interest must be taken in the document of title and not the goods covered by that document of title.

The Commission has come to the conclusion that, while the policy of subsection (4) of the existing Act is the one that from a theoretical point of view is the best, the subsection should not be included in the proposed Act. The basis for this decision is pure pragmatism.

The recently-enacted Alberta and British Columbia Personal Property Security Acts do not have an equivalent to subsection (4). It is unlikely that any other jurisdiction in Canada will include anything similar in its Personal Property Security Act. The reason for this is that most other provinces have enacted the Uniform Warehouse Receipts Act which gives elements of true negotiability to warehouse receipts. Subsection (4) would negate aspects of this negotiability.

For some reason, Saskatchewan never adopted a Warehouse Receipts Act. Perhaps commercial warehousing of the kind contemplated by this legislation has not been common in Saskatchewan because the most important bulk commodities produced in Saskatchewan are grains which are subject to the Canada Grain Act, which provides its own system of documents of title to grain held in storage. (It is a gross overstatement to say that it is common in any other jurisdiction in Canada.) While there is no evidence to indicate that the lack of a Warehouse Receipts Act has been a significant deficiency in Saskatchewan law, it is the opinion of the Commission that there is no reason why Saskatchewan law should be different from that of almost every other jurisdiction in Canada in this respect. It is the Commission's view that the Saskatchewan Legislature should enact the Uniform Warehouse Receipts Act appropriately modified and that The Personal Property Security Act should accommodate the use of negotiable warehouse receipts as documents of title to goods.

In the absence of subsection (4) of the existing Act, SP1 can take and perfect a security interest in the goods after the negotiable document of title was issued but it cannot rely on section 35(1) to give it priority over another security interest in the goods perfected by perfecting a security interest in the negotiable document of title. Section 27(3) guarantees that perfection of a security interest in a negotiable document of title to goods gives priority over any other security interest in the goods taken after the negotiable document of title was issued. The practical effect of section 27 is that potential secured parties cannot rely on the registry to determine to what security interests they may be subordinated. In order to assess accurately their priority position should they decide to take a security interest in goods, they must determine whether or not the goods are in the possession of a warehouse company and whether or not the company has issued a negotiable warehouse receipt.

(existing Act)

28(1) Subject to the other provisions of this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest therein:

(a) continues as to the collateral unless the secured party expressly or impliedly authorizes such dealing; and

(b) extends to the proceeds.

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected:

(a) by the registration of a financing statement which covers the original collateral and proceeds therefrom and contains a prescribed description;

(b) by the registration of a financing statement which covers the original collateral and proceeds, where the proceeds are of a type or kind which fall within the description of the original collateral;

(c) by the registration of a financing statement which covers the original collateral and proceeds therefrom, where the proceeds are cash proceeds.

(3) In a case other than one mentioned in subsection (2), a security interest in proceeds is a continuously perfected security interest if the interest in the original collateral was perfected, and the security interest in the proceeds remains perfected for a period of 15 days after receipt of the proceeds by the debtor but becomes unperfected thereafter, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same type or kind.

* * *

(proposed Act)

28(1) Subject to this Act, where collateral is dealt with or otherwise gives rise to proceeds, the security interest

(a) continues in the collateral unless the secured party expressly or impliedly authorizes such dealing, and

(b) extends to the proceeds,

but where the secured party enforces a security interest against both the collateral and the proceeds, the amount secured by the security interest in the collateral and the proceeds is limited to the market value of the collateral at the date of the dealing.

(2) A security interest in proceeds is a continuously perfected security interest if the interest in the original collateral is perfected by registration of a financing statement that

(a) contains a description of the proceeds that would be sufficient to perfect a security interest in original collateral of the same kind,

(b) covers the original collateral, if the proceeds are of a kind that are within the description of the original collateral, or

(c) covers the original collateral, if the proceeds consist of money, cheques or deposit accounts in banks or similar institutions.

(3) Where the security interest in the original collateral is perfected other than in a manner referred to in subsection (2), the security interest in the proceeds is a continuously perfected security interest but becomes unperfected on the expiration of 15 days after the security interest in the original collateral attaches to the proceeds, unless the security interest in the proceeds is otherwise perfected by any of the methods and under the circumstances prescribed in this Act for original collateral of the same kind.

COMMENT

There are a number of stylistic and policy changes to this section.

Section 28(1) of the proposed Act contains a qualifier not found in the existing Act. Section 28(1)(b) states that the security interest in the original collateral "extends to the proceeds." In other words, the Act provides for a statutorily created security interest in the proceeds whether or not the security agreement providing for the security interest in the original collateral provides also for a security interest in the proceeds.

In the normal course of events, the right to assert a security interest in proceeds is important in inventory financing situations where there is an express or implied power given to the debtor to sell the original collateral. The secured party knows that the original collateral is to be sold and, consequently, looks to the proceeds as its collateral. However, this is not the only situation in which the secured party has a security interest in the proceeds. Subclauses (a) and (b) of subsection (1) are to be read conjunctively. Where the secured party has not lost its security interest in the original collateral, it can assert that security interest and, as well, can assert its statutory security interest in the proceeds. In order to prevent injustice, the subsection qualifies this right. When the secured party enforces its security interest against the original collateral and proceeds, it cannot recover more than the market value of the original collateral at the date of the dealing. The operation of this aspect of the subsection is displayed in the following scenario:

SP1 loans to D the sum of $5000 and takes and perfects a security interest in a blue automobile owned by D and held by him as consumer

goods. At the date of the loan, the automobile had a market value of $5000. Two years later, without the express or implied consent of SP1, D sells the blue automobile to B. At the time of the sale the automobile is worth only $3000 because of depreciation. B gives to D as payment $1000 and a "trade-in" in the form of a red automobile worth $2000. D dissipates the $1000 and becomes insolvent, and SP1 enforces its security interest in the original collateral (the blue automobile) and the proceeds (the red automobile).

This it is allowed to do under section 28(1), but in so doing, it can recover only $3000, which was the value of the blue car at the date of the sale to B. Even though there remained $5000 owing to it at the date of the sale of the blue car to B, only $3000 of it was secured debt. If the sale had not taken place and SP1 had decided to enforce its security interest at that time, it would recover only $3000. This being the case, there is no reason why it should benefit at the expense of B merely as a result of the happening of an event (the sale of the blue automobile to B) that it did not contemplate happening when it entered into the security agreement with D.

The limitation set out in the section might have inter partes effects between the secured party and the debtor. In the very unusual situation where there is no third party involved but the secured party has available both original collateral and proceeds, the secured party would be limited to the value of the original collateral at the date of the disposition. But there can be no objection to this. The secured party made its bargain with the debtor on the assumption that it would be secured to the value of the original collateral. It does not contemplate the proceeds since it has not given the debtor the right to deal with the original collateral in such a way as to create proceeds. It is an entirely fortuitous event that it is has enhanced security as a result of the creation of the proceeds. The effect of the qualifier in section 28(1) is to prevent section 28(1)(b) from producing an unexpected windfall for the secured party by turning unsecured debt into secured debt at the expense of the debtor or the unsecured creditors of the debtor.

The second important change to this provision is in subsection (2). Under section 2 of the existing Act, it is necessary to indicate a claim to proceeds on a financing statement even though the proceeds collateral is of a type that need not be separately described on the financing statement. This feature could produce unacceptable results. For example, where the original collateral is accounts, the proceeds are likely to be cash. Under section 2(c) of the existing Act, it is not necessary to describe cash proceeds on a financing statement. However, it is apparently necessary to indicate that proceeds are being claimed by the secured party. (See Central Refrigeration & Restaurant Services Inc. v. Canadian Imperial Bank of Commerce (1986), 47 Sask. R. 124 (Sask. C.A.).) The Commission has concluded that this should not be a requirement. There is no need to indicate on a financing statement that cash proceeds are being claimed. This can be assumed in every case. Under section 28(2)(c) of the proposed Act, the perfected status of a security interest in original collateral extends to cash proceeds without the need

to indicate that proceeds are being claimed. Similarly, under section 29(2)(b), the perfected status of a security interest in original collateral extends to proceeds collateral of a kind that are within the description of the original collateral without the need to indicate in the financing statement that a claim is made to such proceeds.

It will be noted that there is no separate definition of "cash proceeds" in the proposed Act as there is in section 2(1)(ge) of the existing Act. The substance of the definition has been incorporated in section 28(2)(c).

There is a change in section 28(3). Under the existing provision, the 15 day "grace period" runs from the date that the debtor receives the proceeds. This provision can create uncertainty in situations where the proceeds are intangibles and it is difficult to determine when the debtor has received the proceeds. Under the proposed Act, the "grace period" expires 15 days after the security interest in the original collateral attaches to the proceeds.

(existing Act)

29(1) Where a debtor sells or leases goods that are subject to a security interest and the goods are returned to or repossessed by:

(a) the debtor;

(b) a transferee of chattel paper or a person having a security interest in an intangible resulting from the sale or lease of the goods;

(c) a secured party who had a security interest in the goods at the time they were sold or leased or anyone claiming from or under him;

the security interest mentioned in clause (c) attached again if the obligation secured remains unfulfilled, and, if the security interest was perfected by registration at the time of the sale or lease and the registration is effective at the time of return or repossession of the goods, nothing further is required to continue the perfected status, but, in any other case, the secured party must take possession of the returned or repossessed goods or must register his security interest in them.

(2) A security interest in goods that attaches while the goods are in the possession of a buyer or a lessee of the debtor and that

is perfected before the goods are returned or repossessed has priority over the security interest mentioned in clause (1)(c).

(3) Where a sale or lease creates chattel paper and the goods are returned or repossessed, the unpaid transferee of the chattel paper has a security interest in the goods, and, if the unpaid transferee took possession of the chattel paper in the ordinary course of business and for new value, the transferee's security interest has priority over the security interest mentioned in clause (1)(c) and has priority over a security interest in the returned or repossessed goods as after-acquired property which first attaches on return or repossession.

(4) Where a sale or lease creates an intangible and the goods are returned or repossessed, the secured party who had the security interest in the intangible has a security interest in the goods, but the security interest mentioned in clause (1)(c) has priority over such interest.

(5) A security interest asserted under subsections (3) and (4) is a perfected security interest in the goods when the security interest in the chattel paper or intangible was perfected, but it becomes unperfected 15 days after the day of return or repossession of the goods, unless the secured party perfects his interest in the goods by taking possession of them or registering his security interest in them before the expiry of that 15 day period.

* * *

(proposed Act)

29(1) Where a debtor sells or leases goods that are subject to a security interest under circumstances in which the buyer or lessee takes free of the security interest under section 28(1)(a) or 30, the security interest reattaches to the goods if

(a) the goods are returned to, seized or repossessed by the debtor or by a transferee of chattel paper created by the sale or lease, and

(b) the obligation secured remains unpaid or unperformed,

(2) Where a security interest reattaches under subsection (1), the perfection of the security interest and the time of registration or perfection is determined as if the goods had not been sold or leased if the security interest was perfected by registration at

the time of the sale or lease and the registration is effective at the time of the return, seizure or repossession.

(3) Where a sale or lease of goods creates an account or chattel paper, and

(a) the account or chattel paper is transferred to a secured party, and

(b) the goods are returned to, seized or repossessed by the debtor or by the transferee of the chattel paper,

the transferee of the account or chattel paper has a security interest in the goods that attaches when the goods are returned, seized or repossessed.

(4) Notwithstanding section 24(1), a security interest in goods arising under subsection (3) is perfected if the security interest in the account or chattel paper was perfected at the time of the return, seizure or repossession, but becomes unperfected on the expiry of 15 days thereafter unless the transferee registers a financing statement relating to the security interest or takes possession of the goods by seizure, repossession or otherwise, before the expiration of that period.

(5) A security interest in goods that a transferee of an account has under subsection (3) is subordinate to a perfected security interest arising under subsection (1) and to a security interest of a transferee of chattel paper arising under subsection (3).

(6) A security interest in goods that a transferee of chattel paper has under subsection (3) has priority over

(a) a security interest in goods reattaching under subsection (1), and

(b) a security interest in goods as after-acquired property that attaches on the return, seizure or repossession of the goods,

if the transferee of the chattel paper would have priority under section 31(6) as to the chattel paper over an interest in the chattel paper claimed by the holder of the security interest in the goods.

(7) A security interest in goods given by a buyer or lessee of the goods referred to in subsection (1) that attaches while the goods are in the possession of the buyer, lessee or debtor and that is perfected when the goods are returned, seized or repossessed

has priority over a security interest in the goods arising under this section.

COMMENT

While this section has been almost totally restructured so as to provide greater clarity, there are no changes in the policies that underlie it.

(existing Act)

30(1) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller or lessor takes free of any perfected or unperfected security interest therein given by or reserved against the seller or lessor or arising under section 29, whether or not the buyer or lessee knows of it, unless the secured party proves that the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement.

(2) A buyer or lessee of goods bought or leased primarily for personal, family, household or farming uses takes free of a perfected security interest in the goods if:

(a) he gives new value for his interest;

(b) he bought or leased the goods without notice of the security interest; and

(c) he receives delivery of the goods.

(3) Subsection (2) does not apply to a security interest in:

(a) a motor vehicle as defined in the regulations;

(b) fixtures; or

(c) goods whose purchase price exceeds $500 or, in the case of a lease, whose retail market value exceeds $500.

(4) For the purposes of subsections (1) and (2),a sale may be for cash, by exchange for other property or on credit, and includes delivering goods or documents of title under a pre-existing contract for sale, but does not include:

(a) a transfer in bulk;

(b) a transfer as security for, or in total or partial satisfaction of, a money debt; or

(c) any past liability.

(5) A buyer or lessee of goods takes free of a security interest that is temporarily perfected under subsection 26(2), 28(3) or 29(5), or a security interest, the perfection of which is continued under subsection 49(2) during any of the 15-day periods mentioned in that subsection, if:

(a) he gives new value for his interest;

(b) he bought or leased the goods without notice of the security interest; and

(c) he receives delivery of the goods.

* * *

(proposed Act)

30(1) For the purposes of this section,

(a) "buyer of goods" includes a person who obtains vested rights in goods pursuant to a contract to which the person is a party, as a consequence of the goods becoming a fixture or accession to property in which the person has an interest,

(b) "ordinary course of business of the seller" includes the supply of goods in the ordinary course of business as part of a contract for services and materials,

(c) "seller" includes a person who supplies goods that become a fixture or accession under a contract with a buyer or under a contract with a person who is party to a contract with such a buyer.

(2) A buyer or lessee of goods sold or leased in the ordinary course of business of the seller of lessor takes free of any perfected or unperfected security interest given by the seller or lessor or arising under section 28 or 29, whether or not the buyer or lessee knows of it, unless the buyer or lessee also knows that the sale or lease constitutes a breach of the security agreement under which the security interest was created.

(3) A buyer or lessee of goods that are acquired as consumer goods or goods bought for farming uses takes free of a perfected of unperfected security interest in the goods if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the security interest.

(4) Subsection (3) does not apply to a security interest in

(a) a fixture, or

(b) goods the purchase price of which exceeds $1,000.00 or, in the case of a lease, the market value of which exceeds $1,000.00.

(5) A buyer or lessee of goods takes free of a security interest that is temporarily perfected under subsection 26(1), 28(3), or 29(4), or a security interest the perfection of which is continued under section 51 during any of the 15-day periods referred to in those subsections, if the buyer or lessee

(a) gave value for the interest acquired, and

(b) bought or leased the goods without knowledge of the security interest.

(6) Where goods are sold or leased, the buyer or lessee takes free from any security interest in the goods perfected under secion 25 if

(a) the buyer or lessee bought or leased the goods without knowledge of the security interest, and

(b) the goods were not described by serial number in the registration relating to the security interest.

(7) Subsection (6) applies only to goods that are equipment and are of a kind prescribed by the regulations as serial numbered goods.

(8) A sale or lease under subsections (2), (3), (5) or (6) may be

(a) for cash,

(b) by exchange for other property, or

(c) on credit,

and includes delivering goods or a document of title under a pre-existing contract for sale but does not include a transfer as security for, or in total or partial satisfaction of, a money debt or past liability.

COMMENT

There are two important additions and a number of refinements to this section.

There is no equivalent to section 30(1) of the proposed Act in the existing Act. The effect of section 30(1) is to bring within the scope of section 30(2) transactions that otherwise might not be sales in the ordinary course of business of the seller. The policy underlying this aspect of section 30 is displayed in the following scenario.

> A, who is the owner of land, enters into an agreement with C, a contractor, to build a house on the land. In the course of carrying out the contract, C purchases a furnace from SP under a secured instalment sales contract and installs it in the newly-constructed house on A's property. A pays C the full contract price for the construction of the house but C does not meet its obligations to SP.

Section 36, which deals with security interests in fixtures, does not provide any protection for A. (See Manning v. Furnasman Heating Ltd. [1985] 3 W.W.R. 268 (Man. Q.B.) aff'd [1985] 6 W.W.R. 1 (Man. C.A.).) Under that section, SP need not register its security interest in the furnace in a land titles office in order to have priority over A. If A had bought the furnace from C under a contract separate from that under which C constructed the house, he would not need to rely on the special definitions contained in section 30(1), since C would likely be found to be in the business of selling furnaces. However, since he did not do so, there is no contract of sale between A and C and title to the furnace vested in him by operation of the common law of fixtures and not pursuant to a contract of sale.

The definitions in section 30(1) are designed to ensure protection for A. A is defined as a buyer of goods even though title to the furnace vests in him as a consequence of the goods becoming a fixture to the property. C is deemed to be acting in the ordinary course of business of selling the furnace, since it supplied the furnace as part of a contract for services and materials.

Section 30(1) takes the protection a step further. It protects A, even though the furnace was supplied by a subcontractor under a contract with C. For the purposes of section 30(2), the subcontractor would be a "seller" and the supply of

the furnace would be in the ordinary course of business, since the subcontractor supplied it as part of a contract for services and materials.

There are three differences of significance between sections 30(3)-(4) of the proposed Act and sections 30(2)-(3) of the existing Act. Under the proposed Act the value of the goods that can be bought free from a perfected security interest has been increased to $1000 from $500. In addition, motor vehicles qualify as goods that fall within the operation of section 30(3). They are excluded from section 30(2) of the existing Act. Under the proposed Act the buyer or lessee need not take possession of the goods in order to take free from a security interest in the goods. This is a requirement of the existing Act.

Section 30(6) and (7) are a feature of the proposed Act not found in the existing Act. These provisions should be read along with section 35(4) and the revised Personal Property Regulations. They modify the existing system for the registration of security interests in equipment of a kind that must be described by serial number on a financing statement. Under the existing system, collateral in the form of a motor vehicle, trailer, mobile home or airplane held as equipment must be described on a financing statement by serial number. This requirement has elicited complaints from financers who take the position that this requirement places on them the very difficult task of ensuring that an accurate serial number is included on financing statements relating to this equipment. Their primary concern is that failure to include the serial number will result in loss of the collateral to the debtor's trustee in bankruptcy.

The Commission has taken the position that some via media should be sought under which financers of equipment can obtain protection from a trustee in bankruptcy and execution creditors by registering a financing statement using the debtor's name as the sole registration criterion and under which buyers or other secured parties who rely on serial number searches are protected. Sections 30(6)-(7) and 35(4) represent this via media.

The secured party who takes a security interest in equipment is given the option to describe the goods in general terms or specifically by serial number. The choice of one method of registration over the other, however, is not without consequences. If the secured party chooses to describe the equipment specifically by serial number, the maximum level of protection against competing interests is obtained. The security interest would have priority over the interest of a subsequent buyer or lessee of the goods who acquired his or her interest in a sale out of the ordinary course of the debtor's business. It would have priority over any subsequent perfected security interest in the goods (unless some special priority rule applies), and priority over a judgment creditor or trustee in bankruptcy of the debtor. However, if the secured party chooses to describe the equipment only in general terms, thereby making available only the debtor name as the registration-search criterion, its security interest has priority only with respect to judgment creditors and the trustee in bankruptcy of the debtor. It would not have priority over a buyer who acquired the equipment for value and without knowledge of the security interest (section 30(6)-(7)) and it would not have

priority over subsequent perfected security interests in the equipment (section 35(4)) except where a special priority rule applies. Accordingly, if a financer of equipment goods of kinds which, under the Regulations, may be described by serial number is satisfied that the debtor is honest (or concludes that the trouble and cost associated with obtaining and registering the serial numbers of the items of equipment that it is financing is more than off-set by the risk that the debtor is dishonest) but wants protection against potential insolvency of the debtor, it will perfect its security interest by registering a financing statement that describes the equipment in general terms. However, a financer who want full protection from interests that the debtor might create by dealing with the equipment will include a serial number description of its equipment collateral on the financing statement that is registered so as to perfect its security interest.

(existing Act)

31(1) A holder of money has priority over any security interest in it perfected under section 25 or temporarily perfected under subsection 28(3) if the holder:

(a) acquired the money without notice that it was subject to a security interest; or

(b) was a holder for value, whether or not he acquired the money without notice that it was subject to a security interest.

(2) Notwithstanding subsections (1) and (3), a creditor who receives money or an instrument drawn or made by a debtor and delivered in payment of a debt owing to him by that debtor takes free from a security interest in the money or instrument drawn or made by the debtor whether or not the creditor has notice of the security interest.

(3) A purchaser of an instrument or a security has priority over any security interest in the instrument or security perfected under section 25 or temporarily perfected under section 26 or subsection 28(3) if the purchaser:

(a) gave value for his interest;

(b) acquired the instrument or security without notice that it was subject to a security interest; and

(c) took possession of the instrument or security.

(4) A holder to whom a negotiable document of title has been negotiated has priority over any interest in the negotiable document of title that is perfected under section 25 or temporarily perfected under section 26 or subsection 28(3) if the holder:

(a) gave value for the document of title; and

(b) took the negotiable document of title without notice that it was subject to a security interest.

(5) A purchaser of chattel paper who took possession of it in the ordinary course of business and who gave new value for it has priority over:

(a) any security interest that, in the case of chattel paper claimed as original collateral, was perfected under section 25 or any security interest in it as proceeds of equipment or consumer goods, if the purchaser acquired the chattel paper without notice that it was subject to a security interest;

(b) any security interest in it as proceeds of inventory, whether or not the purchaser has notice of the security interest.

* * *

(proposed Act)

31(1) A holder of money has priority over a security interest in it perfected under section 25 or temporarily perfected under subsection 28(4) if the holder

(a) acquires the money without knowledge that it is subject to a security interest, or

(b) is a holder for value, whether or not that person acquires the money without knowledge that it is subject to a security interest.

(2) A creditor who receives an instrument drawn or made by a debtor and delivered in payment of a debt owing to the creditor by that debtor has priority over a security interest in the instrument whether or not the creditor has knowledge of the security interest at the time of delivery.

(3) A purchaser of an instrument or a security has priority over any security interest in the instrument or security perfected under section 25 or temporarily perfected under subsection 28(3) if the purchaser

(a) gave value for the instrument or security,

(b) acquired the instrument or security without knowledge that it is subject to a security interest, and

(c) subject to paragraph (d),took possession of the instrument or security, and

(d) where the security is of a kind that is transferred by an entry in the records of a clearing corporation, an entry has been make in the records of the appropriate clearing corporation indicating that the security has been transferred to the purchaser.

(4) A holder to whom a negotiable document of title is negotiated has priority over a security interest in the document of title that is perfected under section 26 or subsection 28(4) if the holder

(a) gave value for the document of title, and

(b) acquired the document of title without knowledge that it is subject to a security interest.

(5) For the purposes of subsections (3) and (4), a purchaser of an instrument or a security or a holder of a negotiable document of title who acquired it under a transaction entered into in the ordinary course of the transferor's business has knowledge only if the purchaser acquired the interest with knowledge that the transaction violates the terms of the security agreement creating or providing for the security interest.

(6) A purchaser of chattel paper who takes possession of it in the purchaser's ordinary course business and for new value has priority over any security interest in the chattel paper that

(a) was perfected under section 25, if the purchaser does not have knowledge at the time of taking possession that the chattel paper is subject to a security interest, or

(b) has attached to proceeds of inventory under section 28, whatever the extent of the purchaser's knowledge.

COMMENT

There are numerous stylistic changes in this section, but only two changes of substance. The first is the reference to the transfer of uncertificated or deposited securities. Section 31(3) is designed to accommodate the growing practice dealing with securities without transfer of security certificates. (See also section 24(3).)

There is no equivalent in the existing Act to section 31(5) of the proposed Act. This new subsection is designed to reflect business practices more accurately. It implements, in the context of dealings involving securities, instruments and negotiable documents of title, the policy that is implemented in section 30(2) in the context of sales of goods.

Frequently, a security interest will be taken in all of the personal property of a business debtor, including property in the form of securities, instruments or negotiable documents of title. Persons who deal with the debtor in the ordinary course of business may well be aware of the fact that the debtor has given a general encumbrance on its assets, but will assume that the debtor remains free to deal with negotiable assets such as securities, instruments and negotiable documents of title until the secured creditor takes steps to enforce its security interest by the appointment of a receiver or otherwise. Under the current Act, persons who acquire securities, instruments or negotiable documents of title with knowledge of the fact that the debtor has encumbered its assets run the risk of being subordinated to a security interest in the assets of the debtor even though the dealing appeared to be in the ordinary course of business. The Commission has concluded that this risk should be removed. Section 31(5) is designed to do this.

Section 31(2) of the proposed Act, unlike its counterpart in the existing Act, does not contain a reference to "money". This reference was dropped because it is redundant. Since a creditor who receives money is a holder for value, the position of a creditor who is given money in payment of a debt owing by a debtor is addressed in section 31(1)(b).

(existing and proposed Act)

32 **Where a person in the ordinary course of business furnishes materials or services with respect to goods that are subject to a security interest, any lien that he has in respect of such materials or services has priority over a perfected security interest unless the lien is given by an Act that provides that the lien does not have such priority.**

COMMENT

There are no changes in this provision.

(existing Act)

33 The rights of a debtor in collateral may be transferred voluntarily or involuntarily notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but no transfer prejudices the rights of the secured party under the security agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

* * *

(proposed Act)

33(1) For the purposes of this section, "transfer" includes a sale, the creation of a security interest or a transfer under judgment enforcement proceedings.

(2) The rights of a debtor in collateral may be transferred consensually or by operation of law notwithstanding a provision in the security agreement prohibiting transfer or declaring a transfer to be a default, but a transfer by the debtor does not prejudice the rights of the secured party under the agreement or otherwise, including the right to treat a prohibited transfer as an act of default.

COMMENT

Section 33 of the existing Act contains no equivalent to section 33(1) of the proposed Act. The new subsection is designed primarily to address a small conceptual problem associated with section 33 of the existing Act.

Section 33 is essentially a part of the definition of a security interest. Its role is to make it clear that a security interest is a charge and that the debtor is the "owner" of the personal property subject to the security interest. This ownership interest can be voluntarily transferred or encumbered by the debtor or can be seized and sold under judgment enforcement measures. A clause in the security agreement providing that title to the collateral remains or vests in the secured party or prohibiting the debtor from alienating or charging his or her

rights in the collateral does not affect the power of the debtor to deal with that interest.

The primary role of section 33(1) of the proposed Act is to make it clear that section 33(2) applies to the creation of security interests as well as to dispositions of the debtor's rights in the collateral. There is considerable doubt that section 33 of the existing Act applies to creation of a security interest in the collateral since a security interest does not involve a "transfer" of rights in the collateral. It is only a charge on those rights. A secondary role of section 33(1) of the proposed Act is to remove doubt as to what constitutes an involuntary transfer of the debtor's rights in collateral.

(existing Act)

34(1) Subject to section 28, a purchase-money security interest in:

(a) collateral or its proceeds, other than intangibles or inventory, that is perfected within 15 days after the day the debtor obtains possession of the collateral; or

(b) an intangible or its proceeds that is perfected within 15 days after the day the security interest in the intangible attaches;

has priority over any other security interest in the same collateral or its proceeds given by the same debtor.

(2) Subject to section 28 and subsection (4) of this section, a purchase-money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor if:

(a) the purchase-money security interest in the inventory is perfected at the time the debtor receives possession of it; and

(b) the purchase-money secured party serves a notice on any person who has registered a financing statement or security agreement covering the same type or kind of collateral, unless the purchase-money secured party registers his interest before that time, in which case the notice shall be served on secured parties who have registered financing statement or security agreements covering the same type or kind of collateral of the debtor before registration by the purchase-money secured party.

(3) The notice required in subsection (2) shall:

(a) contain a statement that the person giving the notice has acquired or expects to acquire a purchase-money security interest in inventory of the debtor and its proceeds and a description of the inventory and its proceeds according to type or kind; and

(b) be served at any time within a period of two years before the debtor receives possession of the collateral.

(4) No purchase-money security interest in proceeds ofinventory has priority over a security interest in accounts given for new value where a financing statement relating thereto is registered before the purchase-money security interest is perfected or a financing statement relating thereto is registered.

(5) A non-proceeds purchase-money security interest has priority over a purchase-money security interest in proceeds under subsections (1) and (2) in the same collateral if the non-proceeds purchase-money security interest is perfected at the time the debtor obtains possession of the collateral or within 15 days thereafter.

(6) A perfected security interest in crops or their proceeds, given, not more than three months before the crops become growing crops by planting or otherwise, to enable the debtor to produce the crops during the production season, has priority over an earlier perfected security interest to the extent that the earlier interest secures obligations that were contracted more than six months before the crops become growing crops by planting or otherwise, even though the person giving the consideration has notice of the earlier security interest.

* * *

(proposed Act)

34(1) In this section, a "non-proceeds security interest" or "non-proceeds purchase money security interest" means a security interest or purchase money security interest, as the case may be, in original collateral.

(2) Subject to subsection (6) and section 28, a purchase money security interest in

(a) collateral or its proceeds, other than intangibles or inventory, that is perfected not later than 15 days after

the day the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, or

(b) an intangible or its proceeds that is perfected not later than 15 days after the day the security interest in the intangible attaches,

has priority over any other security interest in the same collateral given by the same debtor.

(3) Subject to subsection (6) and section 28, a purchase money security interest in inventory or its proceeds has priority over any other security interest in the same collateral given by the same debtor if

(a) the purchase money security interest in the inventory is perfected at the time the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier,

(b) the secured party gives a notice to any other secured party who has, before the time of registration of the purchase money security interest, registered a financing statement containing a description that includes the same item or kind of collateral,

(c) the notice referred to in clause (b) states that the person giving the notice expects to acquire a purchase money security interest in inventory of the debtor, and describes the inventory by item or kind, and

(d) the notice is given before the debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier.

(4) A notice referred to in subsection (2) may be given in accordance with section 68 or by registered mail addressed to the address of the person to be notified as it appears in the financing statement referred to in subsection (2)(b).

(5) Subject to section 28, a purchase money security interest in goods and its proceeds, taken by a seller, lessor or consignor of the collateral, that is perfected

(a) in the case of inventory, at the date a debtor, or another person at the request of the debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, no later than 15 days after a debtor, or another person at the request of a debtor, obtains possession of the collateral, whichever is earlier,

has priority over any other purchase money security interest in the same collateral given by the same debtor.

(6) A non-proceeds security interest in accounts given for new value has priority over a purchase money security interest in the accounts as proceeds of inventory if a financing statement relating to the security interest in the accounts is registered before the purchase money security interest is perfected or a financing statement relating to it is registered.

(7) A non-proceeds purchase money security interest has priority over a purchase money security interest in the same collateral or proceeds, if the non-proceeds purchase money security interest is perfected

(a) in the case of inventory, at the date a debtor, or another person at the request of a debtor, obtains possession of the collateral, whichever is earlier, and

(b) in the case of collateral other than inventory, not later than 15 days after a debtor, or another person at the request of a debtor, obtains possession of the collateral, whichever is earlier.

(8) For the purposes of this section, where goods are shipped by common carrier to a debtor or to a person designated by a debtor, the debtor is deemed not to have obtained possession of the goods until the debtor has obtained actual possession of the goods or a document of title to the goods, whichever is earlier.

(9) A purchase money security interest in an item of collateral does not extend to or continue in the proceeds of the collateral after the obligation secured by the purchase money security interest in the original collateral has been discharged.

(10) A perfected security interest in crops or their proceeds given for value to enable a debtor to produce the crops and given while the crops are growing crops or during a period of six months immediately prior to the time the crops become growing crops, has priority over any other security interest in the same collateral given by the same debtor.

(11) A perfected security interest in fowl, cattle, horses, sheep, swine or fish or their proceeds given for value to enable the debtor to acquire food, drugs or hormones to be fed to or placed in the animals or fish has priority over any other security interest in the same collateral given by the same debtor other than a perfected purchase money security interest.

COMMENT

Subsection (1) (proposed Act)

This definition relates exclusively to subsections (6) and (7) and is designed to remove any doubt as to the meaning of "non-proceeds security interest".

Subsection (2) (proposed Act)

This is the equivalent of subsection (1) of the existing Act. Only minor changes have been made in the provision. Unlike existing subsection (1), it addresses the situation where possession of the collateral has been acquired by someone at the request of the debtor.

Subsections (3)-(4) (proposed Act)

These subsections are the equivalent of subsections (2) and (3) of the existing Act. A significant change has been made in the notice requirements associated with purchase money security interests in inventory and proceeds of inventory. Under section 34(3)(b) of the existing Act, the notice must be served within a period of two years before the debtor receives possession of the collateral. This requirement has been the subject of a considerable amount of complaint by financers who provide continuous purchase money inventory financing. It is pointed out that subsequent notices can be easily overlooked with the result that the purchase money status is lost. This is so even though the prior non-purchase money financer was not in any way misled by the lack of the notice. The Commission has concluded that these complaints are justified and that a single notice to a prior non-purchase money financer is sufficient.

Subsection (6) (proposed Act)

This is the equivalent of section 34(4) of the existing Act. The proposed subsection (6) makes it clear that the special priority given to security interest in accounts applies only to non-proceeds purchase money security interests. While

this is implicit in existing section 34(4), there is no reason to leave any doubt in the matter.

Subsection (7) (proposed Act)

There is no equivalent to this subsection in the existing Act. The subsection deals with a very controversial issue.

Under The Personal Property Security Act, it is possible to have two purchase money security interests in the same collateral. One of the situations in which this can occur is where the purchase price of goods is financed in part from a secured loan made by one secured party and in part under a secured instalment sales contract (chattel paper) which is bought by another secured party. The issue addressed in subsection generally arises in the context of the following situation:

> D, wanting to buy an automobile, obtains a loan from a bank (SP1) sufficient for the down payment and obtains credit from the seller (SP2) for the balance of the purchase price. If D gives to both SP1 and SP2 a security interest in the automobile, each has a purchase-money security interest in it since each has supplied value to enable D to acquire rights in it.

It will be noted that sections 34(1) and (2) of the existing Act give special priority status to a purchase-money security interest over "any other security interest in the same collateral given by the same debtor". By themselves, these provisions are not helpful since in this context they provide for a completely circular result: SP1 has priority over SP2 who has priority over SP1. This being the case, priority between SP1 and SP2 is determined under section 35(1). While the matter has not been litigated in Saskatchewan courts, it is most likely that authorities in Ontario that apply the first in time rule would be followed in Saskatchewan.

A strong argument has been made that section 35(1) does not provide a commercially acceptable outcome where, as a result of its application, priority is given to SP1. It is argued that priority should go to the seller, SP2. This argument is based in part on the fact that such a rule would reflect pre-Personal Property Security Act law and commercial practice. Under pre-Personal Property Security Act law, SP2 (generally a seller under a conditional sales contract) retained title to the goods until the full purchase price and credit charge were paid. Consequently, it could never have lost priority to someone who held a chattel mortgage on the goods, even though the mortgage may have been executed before the date of the sales contract. The reason for this was that the mortgage could only be an equitable mortgage on the interest of the buyer. That interest was only the interest of a buyer in possession under a conditional sale contract. SP2 had priority because it held legal title. This argument would have carried more weight if it had been made when the existing Act was being drafted. It has lost most of

its strength since section 35(1) has been the applicable priority rule in Saskatchewan for the last seven years with the result that secured sellers cannot argue that they are being asked to carry on business in the context of a legal environment that, in this respect, is fundamentally different from that to which they are accustomed.

Section 34(7) of the proposed Act gives priority to the seller secured party over the lender secured party when both have purchase-money security interests. The Commission has concluded that the best argument for the enactment of section 34(7) of the proposed Act is that the circumstances in which secured sales transactions occur in Saskatchewan are such that the application of section 35(1) can be unnecessarily disruptive and that secured purchase money lenders are well-positioned to avoid any detrimental consequences associated with the proposed section 34(7).

Many credit sales of large ticket items, such as automobiles, are made at times when it is difficult for the seller to obtain a timely search result from the Personal Property Registry to determine whether or not the proposed buyer has given a purchase-money security interest to secure the down payment demanded by the seller. This being the case, under the existing Act the seller must take the risk that no such security interest has been given or must refuse to deliver the goods to the buyer until a search result can be obtained. Most buyers do not expect to have to wait several days before getting possession of an item that they have purchased. The Commission has concluded that the Act should facilitate, not hinder, business practices and reasonable buyer expectations.

The proposed section 37(7) will produce some inconvenience to secured lenders but is not likely to have any dramatically detrimental effects on their legal position. Indeed, there is reason to believe that it will have little practical effect in most situations since, under the existing Act, a lender providing a loan to purchase a motor vehicle to be held by a debtor as consumer goods or equipment, must include the serial number of the vehicle on its financing statement. Consequently, it is often impossible to register a financing statement until after the goods have been acquired since, in most cases, only then can the serial number be determined. This being the case, it is difficult under current law for a secured purchase money lender to get a financing statement registered before a purchase money seller.

A purchase money lender which is concerned about having priority over a purchase money seller will either insist on getting the seller to subordinate its interest to the lender or will provide financing for the full amount of the purchase price of the goods being bought. If a lender is financing the full purchase price of an item, it can protect itself from any attempt of the borrower to use only a portion of the loan as a down payment and the balance for other purposes by making sure that the full amount of the loan gets into the hands of the seller.

Subsection (9) (proposed Act)

There is no equivalent to this section in the existing Act. The sole purpose of the section is to avoid misapplication of the ruling of the Saskatchewan Court of Appeal in Chrysler Credit Canada Ltd. v. The Royal Bank [1986] 6 W.W.R. 338.

The Commission has concluded that when the original obligation secured by a purchase money security interest has been discharged, there is no public policy reason why the secured party should be able to retain a purchase money priority with respect to other obligations of the debtor. The proposed Act reflects this position. (See Professor Ronald C.C. Cuming in "Judicial Treatment of The Saskatchewan Personal Property Security Act" (1986) 51 Sask. Law Rev. 129 at 156-159.)

Subsection (10) (proposed Act)

The equivalent to this provision is section 34(6) of the existing Act. There are, however, significant differences between the two provisions.

The Commission had concluded that section 34(6) of the existing Act is unnecessarily complex and restrictive. In order to have the priority given by the section, the security interest in the crops must have been taken within three months from the time the crops became growing crops and must be in competition with a security interest in the crops taken more than six months before the crops become growing crops. Since the purpose of the section is to encourage financers to grant credit to producers who need credit to purchase inputs, it should not be difficult to apply and should be unnecessarily restrictive. The proposed section 34(10) eliminates the difficulties associated with the existing section 34(6).

Subsection (11) (proposed Act)

There is no equivalent to this subsection in the existing Act. The purpose of this section is to extend the policy of subsection (10) to producers involved in the raising of animals. The Commission has concluded that there is no reason to limit the special priority given to agricultural input financers to situations where the collateral is crops.

(existing Act)

35(1) If no other provision of this Act is applicable, priority between conflicting, perfected security interests in the same collateral is determined by the order of:

(a) registration;

(b) possession of the collateral by the secured party pursuant to section 24;

(c) perfection;

whichever is earliest, and, as between unperfected security interests, by the order of attachment.

(2) Where there is a period, after the registration of a security interest, the taking of possession of the collateral by the secured party or the perfection of the security interest, during which there is no registration of the security interest, possession of the collateral by the secured party or perfection of the security interest, priority of the security interest dates from the time when it is reregistered, reperfected or from the time the secured party retakes possession.

(3) The time for determining priority of conflicting security interests in proceeds where no other provision of this Act is applicable is the same time as established under subsection (1) for determining priority between conflicting security interests in the collateral.

(4) If future advances are made while a security interest is perfected, the security interest has the same priority for the purposes of this section with respect to future advances as it has with respect to the first advance.

(5) Where the registration of a security interest lapses as a result of the secured party's failure to renew the registration or where the registration of a security interest has been discharged fraudulently, in error or without authorization, the secured party may reregister his security interest within 30 days after the lapse or discharge, and where he reregisters, the prior lapse or discharge does not affect the priority status of the security interest in relation to competing interests in the collateral which arose prior to the lapse or discharge, except insofar as subsequent advances are made or contracted for following the lapse or discharge and prior to the reregistration.

(6) Where a debtor transfers his interest in collateral which, at the time of the transfer is subject to a perfected security interest, that security interest has priority over any other security interest granted by the transferee before the transfer, except insofar as the security interest granted by the transferee secures advances made or contracted for after the transfer at a time when the security interest granted by the debtor is unperfected through the operation of section 49.

(7) Subsection (6) does not apply where the transferee acquires the debtor's interest free from the security interest granted by the debtor.

* * *

(proposed Act)

35(1) Where this Act provides no other method for determining priority between security interests,

(a) priority between conflicting perfected security interests in the same collateral is determined by the order of the occurrence of the following

(i) the registration of a financing statement without regard to the date of attachment of security interest,

(ii) possession of the collateral pursuant to section 24 without regard to the date of attachment of the security interest, or

(iii) perfection under sections 5, 7, 26, 28, 29, or 72 whichever is earliest,

(b) a perfected security interest has priority over an unperfected security interest, and

(c) priority between conflicting unperfected security interests is determined by the order of attachment of the security interests.

(2) For the purposes of subsection (1), a continuously perfected security interest is to be treated at all times as perfected by the method by which it was originally perfected.

(3) For the purpose of subsection (1), but subject to section 28, the time of registration, possession or perfection of a security interest in original collateral is also the time of registration, possession or perfection of its proceeds.

(4) A security interest in goods that are equipment and are of a kind prescribed by the regulations as serial numbered goods is not registered or perfected by registration for the purposes of subsection (1), (7) or (8) unless a financing statement relating to the security interest and containing a description of the goods by serial number is registered.

(5) Subject to subsection (6), the priority which a security interest has under subsection (1) applies to all advances, including future advances.

(6) A perfected security interest has priority over the interests of persons referred to in clause 20(1)(a) only to the extent of

(a) advances made before the interests of the persons arise, or made before the sheriff seizes the collateral or obtains a right to it under The Creditors' Relief Act,

(b) advances made before the secured party acquires knowledge of

(i) the interests of the persons,

(ii) seizure of the collateral by the sheriff, or

(iii) an order giving the sheriff rights to the collateral,

(c) advances made pursuant to a

(i) statutory requirement, or

(ii) a legally binding obligation owing to a person other than the debtor entered into by the secured party before acquiring the knowledge referred to in paragraph (b), and

(d) reasonable costs and expenses incurred by the secured party for the protection, preservation, maintenance or repair of the collateral.

(7) Where registration of a security interest lapses as a result of a failure to renew the registration or where a registration is discharged without authorization or in error, and the secured party registers the security interest 30 days after the lapse or discharge, the lapse or discharge does not affect the priority status of the security interest in relation to a competing perfected security interest that immediately prior to the lapse or discharge had a subordinate priority position, except to the extent that such competing security interest secures advances made or contracted for after the lapse or discharge and prior to the reregistration.

(8) Where a debtor transfers an interest in collateral which at the time of the transfer is subject to a perfected security interest, that security interest has priority over any other security

interest granted by the transferee before the transfer except to the extent that the security interest granted by the transferee secures advances made or contracted for

(a) after the expiry of 15 days from the day the secured party who holds the security interest in the transferred collateral has knowledge of the information required to register a financing change statement showing the transferee as the new debtor, and

(b) before the secured party referred to in clause (a) amends the registration to disclose the name of the transferee as the new debtor or takes possession of the collateral.

(9) Subsection (7) does not apply where the transferee acquires the debtor's interest free from the security interest granted by the debtor.

COMMENT

Section 35(1) of the proposed Act has been modified to remove the ambiguities associated with its counterpart in the existing Act. The subsection makes it clear that priority is determined on the basis of the order of the occurrence of registration, possession or perfection without regard to the date of attachment of the security interest involved. The subsection also provides clarity as to the role of perfection by referring specifically to the sections under which temporary perfection is permitted.

The counterpart of section 35(1)(b) of the proposed Act is section 20(1)(a) of the existing Act. The repositioning of this priority rule has the effect of leaving to section 20 priority issues involving interests other than security interests.

The counterpart of section 35(2) of the proposed Act is the final portion of section 23(1). The symmetry of the Act is improved by bringing this provision into section 35 where it has its effect.

The proposed Act contains no equivalent to subsection (2) of the existing Act. The subsection states an obvious proposition and therefore need not be retained in the proposed Act.

Section 35(3) is a refinement of section 35(3) of the existing Act.

Section 35(4) is a feature of the proposed Act not found in the existing Act. These provisions should be read along with section 30(6) and (7) and the revised

Personal Property Regulations. They modify the existing system for the registration of security interests in equipment of a kind that must be described by serial number on a financing statement. Under the existing system, collateral in the form of a motor vehicle, trailer, mobile home, or airplane held as equipment must be described on a financing statement by serial number. This requirement has elicited complaints from financers who take the position that this requirement places on them the very difficult task of ensuring that an accurate serial number is included on financing statements relating to this equipment. Their primary concern is that failure to include the serial number will result in loss of the collateral to the debtor's trustee in bankruptcy.

The Commission has taken the position that some via media should be sought under which financers of equipment can obtain protection from a trustee in bankruptcy and execution creditors by registering a financing statement using the debtor's name as the sole registration criterion and under which buyers or other secured parties who rely on serial number searches are protected. Sections 30(6)-(7) and 35(4) represent this via media.

The secured party who takes a security interest in equipment is given the option to describe the goods in general terms or specifically by serial number. The choice of one method of registration over the other, however, is not without consequences. If the secured party chooses to describe the equipment specifically by serial number, the maximum level of protection against competing interests is obtained. The security interest would have priority over the interest of a subsequent buyer or lessee of the goods who acquired his or her interest in a sale out of the ordinary course of the debtor's business. It would have priority over any subsequent perfected security interest in the goods (unless some special priority rule applies), and priority over a judgement creditor or trustee in bankruptcy of the debtor. However, if the secured party chooses to describe the equipment only in general terms, thereby making available only the debtor name as the registration-search criterion, its security interest has priority only with respect to judgement creditors and the trustee in bankruptcy of the debtor. It would not have priority over a buyer who acquired the equipment for value and without knowledge of the security interest (section 30(6)-(7)) and it would not have priority over subsequent perfected security interests in the equipment (section 35(4)) except where a special priority rule applies. Accordingly, if a financer of equipment goods of kinds which, under the Regulations, may be described by serial number is satisfied that the debtor is honest (or concludes that the trouble and cost associated with obtaining and registering the serial numbers of the items of equipment that it is financing is more than off-set by the risk that the debtor is dishonest) but wants protection against potential insolvency of the debtor, it will perfect its security interest by registering a financing statement that describes the equipment in general terms. However, a financer who wants full protection from interests that the debtor might create by dealing with the equipment will include a serial number description of its equipment collateral on the financing statement that is registered so as to perfect its security interest.

Section 35(5) of the proposed Act removes an ambiguity contained in section 35(4) of the existing Act. Under the latter, there is a suggestion that in order to tack future advances, the security interest must be perfected. This, of course, is not the policy of the section. Section 35(5) of the proposed Act makes it clear that the priority of future advances is the same as any other advance under the security agreement. This priority is determined in accordance with section 35(1). Note that the terms "advance" and "future advance" are separately defined. (See section 2(1)(c) and 2(1)(r).)

The equivalent to section 35(6) of the proposed Act is section 20(2) of the existing Act. Section 20(2) is quite obscure and difficult to interpret. For this reason, it has been reformulated in the proposed Act. Since it affects the priority status of a perfected security interest, it has been moved to section 35. In addition, the section has been refined somewhat. Under the existing Act, the secured party cannot tack as against an execution creditor any advances made with knowledge of the seizure of the collateral. Under section 14, the secured party is relieved of any obligation to make such advances once it becomes aware of the seizure of the collateral. Under section 14 of the proposed Act, the secured party is relieved from an obligation to the debtor to make future advances when it becomes aware that the collateral is seized in execution, but is not relieved from an obligation to a third party or from a statutory obligation to make future advances. Consequently, the secured party should be allowed to tack all obligatory future advances. Section 35(6)(c) so provides.

Section 35(7) of the proposed Act is the equivalent of section 35(5) of the existing Act. Minor wording changes have been made in the provision, but the policy and operation of the two provisions is the same.

(existing Act)

36(1) Except as provided in subsections (2) and (3), a security interest that attaches to goods:

(a) before they become fixtures has priority as to the goods over the claim of any perosn who has an interest in the real property;

(b) after they become fixtures has priority over the claim of any person who subsequently acquires an interest in the real property, but not over any person who has a registered interest in the real property at the time the security interest attaches to the goods and who has not consented in writing to the security interest or disclaimed an interest in the goods as fixtures.

(2) A security interest mentioned in subsection (1):

(a) is subordinate to the interest of:

(i) a subsequent purchaser for value of an interest in real property; and

(ii) a person with a prior registered encumbrance on the real property in respect of subsequent advances;

if the subsequent purchase or subsequent advance under a prior encumbrance is made or contracted for without fraud and before the security interest is filed in accordance with section 54; and

(b) is subordinate to the interest of:

(i) a creditor of the debtor; and

(ii) a sheriff;

who has acquired through legal process a lien or charge against the land to enforce a judgment if the lien or charge arises before the security interest is filed accordance with section 54.

(3) No lien or charge mentioned in clause (2)(b) takes priority over a purchase-money security interest in the goods that is filed in accordance with section 54 before, on or within 15 days after the day the debtor obtains possession of the goods.

(4) A secured party who, under this Act, has the right to remove goods from real property shall exercise his right of removal in a manner that causes no greater damage or injury to the land or to the other property situated thereon, or that puts the owner, lessee or occupier of the land to any greater inconvenience than is necessarily incidental to the work of effecting the removal of the goods.

(5) Any person, other than the debtor, who has an interest in real property at the time goods subject to a security interest are attached to the real property is entitled to reimbursement for any damage to his interests in the real property resulting from the removal of the goods, but is not entitled to reimbursement for diminution in the value of the real property caused by the absence of the goods removed or by the necessity for replacement.

(6) The persons entitled to reimbursement as provided in subsection (5) may refuse permission to remove the goods until the secured party has given adequate security for the reimbursement.

(7) The secured party may apply to a court for an order:

(a) determining the persons entitled to reimbursement under this section;

(b) determining the amount and kind of security to be provided by the secured party;

(c) prescribing the depository for the security;

(d) dispensing with the consent of any or all of the persons mentioned in clause (a).

(8) A person having an interest in real property that is subordinate to a security interest by virtue of subsection (1) may, before the goods have been removed from the real property by the secured party, retain the goods upon payment to the secured party of the amount secured by the security interest having priority over his interest.

(9) The secured party who has the right to remove goods from real property shall serve, on each person who appears by the records of the land titles office to have an interest in the land, a notice in writing of his intention to remove the goods which notice shall contain:

(a) the name and address of the secured party;

(b) a description of the goods to be removed sufficient to enable them to be identified;

(c) the amount required to satisfy the obligation secured by his security interest;

(d) a description of the land to which the goods are affixed; and

(e) a statement of intention to remove the goods unless the amount secured is paid on or before a specified day that is not less than 12 days after service of the notice in accordance with subsection (10).

(10) A notice mentioned in subsection (9) shall be served at least 15 days before removal of the goods and may be served in

accordance with subsection 67(1) or by registered mail addressed to the post office address of the person to be served as it appears in the records of the land titles office.

(11) Any person entitled to receive a notice under subsection (9) may apply to a judge for an order postponing removal of the goods from the real property, and the judge may make any order that he considers just and reasonable.

* * *

(proposed Act)

36(1) In this section, "secured party" includes a receiver.

(2) Subject to the regulations, this section applies only with respect to land for which a certificate of title has been issued under The Land Titles Act.

(3) Except as provided in this section and in section 30, a security interest in goods that attaches before or at the time the goods become fixtures has priority with respect to the goods over a claim to the goods made by a person with an interest in the land.

(4) A security interest referred to in subsection (3) is subordinate to the interest of

(a) a person who acquires for value an interest in the land after the goods become fixtures including an assignee for value of a persn with an interest in the land at the time the goods become fixtures, and

(b) any person with a registered mortgage of the land who, after the goods become fixtures

(i) makes an advance under the mortgage after the goods become fixtures, but only with respect to such advance, or

(ii) obtains an order for sale or foreclosure after the goods become fixtures,

without fraud and before the security interest is registered in accordance with section 49.

(5) A security interest in goods that attaches after the goods become fixtures is subordinate to the interest of a person who

(a) has an interest in the land at the time the goods become fixtures and who

(i) has not consented to the security interest,

(ii) has not disclaimed an interest in the goods or fixtures,

(iii) has not entered into an agreement under which person is entitled to remove the goods, or

(iv) is not otherwise precluded from preventing the debtor from removing the goods, or

(b) acquires an interest in the land after the goods become fixtures, if the interest is acquired without fraud and before the security interest in the goods is registered in accordance with section 49.

(6) A security interest referred to in subsection (3) or (5) is subordinate to

(a) the interest of a creditor of the debtor who causes a writ of execution affecting the real property to be transmitted to the appropriate land titles office,

(b) a sheriff who submits for registration in the appropriate land titles office a certificate affecting the land issued under The Creditors' Relief Act,

before the security interest is registered in accordance with section 49.

(7) The interest of a creditor or a sheriff referred to in subsection (6) does not take priority over a purchase money security interest in goods in respect of which a notice is filed in accordance with section 49 not later than 15 days after the goods are affixed to the land.

(8) A secured party who, under this Act, has the right to remove goods from land shall exercise this right of removal in a manner that causes no greater damage or injury to the land and to other property situated on it or that puts the occupier of the land to greater inconvenience than is necessarily incidental to the removal of the goods.

(9) A person, other than the debtor, who has an interest in the land at the time the goods subject to the security interest are affixed

to the land is entitled to reimbursement for any damages to the interest of the person in the land caused during the removal of the goods, but is not entitled to reimbursement for diminution in the value of the land caused by the absence of the goods removed or by the necessity or replacement.

(10) The person entitled to reimbursement as provided in subsection (9) may refuse permission to remove the goods until the secured party has given adequate security for reimbursement.

(11) The secured party may apply to a court for any one or more of the following

(a) an order determining the person entitled to reimbursement under this section,

(b) an order determining the amount and kind of security to be provided by the secured party,

(c) an order prescribing the depository for the security,

(d) an order authorizing the removal of the goods without the provision of security for reimbursement under subsection (10).

(12) A person having an interest in the land that is subordinate to a security interest as provided in this section may, before the goods have been removed from the land by the secured party, retain the goods upon payment to the secured party of the lesser of

(a) the amount secured by the security interest having priority over such interest, and

(b) the market value of the goods if the goods were removed from the land.

(13) The secured party who has a right to remove goods from land shall give to each person who appears by the records of the land titles office to have an interest in the land, a notice of the intention of the secured party to remove the goods, and the notice shall contain

(a) the name and address of the secured party,

(b) a description of the goods to be removed,

(c) the amount required to satisfy the obligation secured by the security interest,

(d) the market value of the goods,

(e) a description of the land to which the goods are affixed, and

(f) a statement of intention to remove the goods

unless the amount referred to in subsection (12) is paid on or before a specified date than is not less than 15 days after the notice is given in accordance with subsection (12).

(14) A notice referred to in subsection (13) shall be given at least 15 days before removal of the goods, and may be given in accordance with section 68 or by registered mail addressed to the post office address of the person to be notified as it appears in the records of the land titles office.

(15) A person entitled to receive a notice under subsection (14) may apply to a court for an order postponing removal of the goods from the land.

COMMENT

A number of refinements, structural changes and minor policy changes have been incorporated in section 36 of the proposed Act.

Sections 36(3) and (5) of the proposed Act are equivalent of section 36(1) of the existing Act. Since the circumstances contemplated by subsection (1)(a) and the circumstances comtemplated by subsection (1)(b) are very different and subject to a different priority regime, the Commission decided that the two should be included in separate subsections. Section 36(5) of the proposed Act provides a list of circumstances that are implicit in section 36(1)(b) of the existing Act. The Commission has decided that, for the sake of clarity, these circumstances should be spelled out.

The most important differences between section 36 of the proposed Act and its counterpart in the existing Act are to be found in section 36(4) of the proposed Act. Under the proposed Act, the priority rights of persons who acquire rights in the land to which the fixtures collateral have been attached are spelled out in greater detail. Further, two additional types of interest are brought into the priority scheme. Four types of interests in the land are specifically addressed in the proposed Act. The first is "a person who acquires an interest for value in the land after the goods become fixtures". This would include a buyer or mortgagee

of the land. The term "purchaser" used in section 36(2)(a)(i) of the existing Act would encompass these interests. However, the more general designation of persons in this category was thought to be preferable. The second type of interest mentioned is that of an "assignee for value of a person with an interest in the land at the time the goods become fixtures". It is not clear that such a person would be protected under the existing Act. Generally, an assignee steps into the shoes of the assignor. If the assignor did not have priority, can the assignee have priority? The matter is resolved in the proposed Act in favour of the assignee since an assignee will rely on the Land Titles Act registry in assessing the quantum of interest it is acquiring. Some clarity has been brought to the position of a prior mortgagee (the third type of interest) who makes or contracts to make future advances. The proposed Act makes it clear that these advances must be made or contracted for after the goods become fixtures.

The fourth type of interest recognized in the proposed new section 36(4) is the interest of a mortgagee who obtains an order for foreclosure or sale before the security interest in the fixture is registered in the appropriate land registry office. The Commission has concluded that, even though a mortgagee does not otherwise have priority over the interest of the holder of a security interest in a fixture because the mortgage was taken before the goods were affixed, the mortgagee is entitled to know when it obtains an order for foreclosure or sale whether or not the fixtures on the land foreclosed or sold are subject to a security interest. Without this knowledge, the mortgagee would have no alternative but to retain in trust the value of the fixtures on the premises for the duration of the limitation period.

There is a significant difference between section 36(6) of the proposed Act and its counterpart, section 36(2)(b) of the existing Act. Under the existing Act, any writ of execution or sheriff's certificate registered against the land to which the goods are affixed has priority over a security interest in the fixture that is not registered in the land title registry or that is registered after the writ is registered. Under the proposed Act, priority is given only to writs or sheriff's certificates obtained by creditors of the debtor and not creditors of an owner of the land other than the debtor. Accordingly, where the debtor under the security agreement is a tenant and the writ of exectution is registered against the land of the landlord (who is the execution debtor), the priority structure of section 36 does not come into play. The Commission has decided to limit the scope of section 36 in this way since the rights of a creditor of the owner of the land will be subject to the rights of the tenant to remove the fixture. While failure to register the security interest in a fixture in the land titles registry results, under the existing Act, in the security interest being subordinate to the execution creditor of the owner of the land, this priority will be illusory should the tenant debtor assert his rights to remove the fixtures and return them to goods.

Section 36(12) of the proposed Act makes explicit what may be implicit in section 36(8) of the existing Act. Under the proposed Act, the person with an interest in the land may prevent removal of the fixture by the secured party by paying to the secured party the lesser of the amount secured by the security

interest and the market value of the goods. Under the existing Act, no mention is made of the right to pay the value of the goods. However, it can be effectively argued that "the amount secured by the security interest" in the fixture cannot exceed the value of the fixture. Any amount owing by the debtor in excess of the value of the fixture will be unsecured or will be secured by collateral other than the fixture. The Commission has decided to remove any doubt in the matter and make it clear that the person with an interest in the land can pay the lesser of the amount secured and the market value of the goods.

(existing Act)

There is no equivalent to this section in the existing Act.

* * *

(proposed Act)

37(1) In this section "secured party" includes a receiver.

(2) Subject to the regulations, this section applies only with respect to land for which a certificate of title has been issued under The Land Titles Act.

(3) Except as provided in this section, a security interest is growing crops has priority with respect to the crops claimed by a person with an interest in the land.

(4) A security interest referred to in subsection (2) is subordinate to the interest of

(a) a person who acquires for value an interest in the land while the crops are growing crops, including an assignee for value of a person with an interest in the land where the assignee acquires the interest for value and while the crops are growing crops, and

(b) any person with a registered mortgage on the land who

(i) makes an advance under the mortgage after the crops become growing crops, but only with respect to the advance, or

(ii) obtains an order for sale or foreclosure after the crops become growing crops,

(iii) obtains an order confirming sale or a vesting order in a foreclosure action after the crops become growing crops

without fraud and before the security interest is registered in accordance with section 49.

(5) A security interest referred to in subsection (3) is subordinate to

(a) the interest of a creditor of the debtor who causes a writ of execution affecting the land to be transmitted to the appropriate land titles office,

(b) a sheriff who submits for registration in the appropriate land titles office a certificate affecting the land issued under The Creditors' Relief Act,

before the security interest is registered in accordance with section 49.

(6) The interest of a creditor or a sheriff referred to in subsection (5) does not take priority over a purchase money security interest in the crops, or a security interest in the crops referred to in subsection 34(9), that is registered in accordance with section 49 not later than 15 days after the time the security interest in the crops attaches.

(7) Subsections (8) to (15) of section 36 apply with all necessary modifications to seizure and removal of growing crops from the land.

COMMENT

Security interests can be taken in crops, but there is no statutory system for regulating priorities between a holder of a security interest in a crop and a person who acquires an interest in the land before the crop is severed. The implication of the existing Act is that the holder of the security interest has priority since the crops are treated as personal property.

The Commission has decided that a registration and priority regime similar to that contained in section 36 can be applied to security interests in crops.

(existing Act)

37(1) Except as provided in subsections (2) and (3) of this section and in section 38, a security interest in goods that attaches:

(a) before they become an accession has priority as to the accession goods over the claim of any person in respect of the whole;

(b) after they become an accession has priority over the claim of any person who subsequently acquires an interest in the whole, but not oer any person who has an interest in the whole at the time the security interest attaches to the accessions and who has not consented in writing to the security interest in the accession or disclaimed an interest in the accession as part of the whole.

(2) A security interest mentioned in subsection (1):

(a) is subordinate to the interest of:

(i) a subsequent purchaser for value of an interest in the whole; and

(ii) a creditor with a prior perfected interest in the whole to the extent that he makes subsequent advances;

if the subsequent purchaser or subsequent advance under the prior perfected security interest is made or contracted for before the ecurity interest is perfected; and

(b) is subordinate to the interest of:

(i) a creditor of the debtor; and

(ii) a sheriff;

who has caused the whole to be seized under judicial process to enforce a judgement, if the seizure occurs before the security interest is perfected.

(3) No interest of a creditor or the sheriff mentioned in clause (2)(b) takes priority over a purchase-money security interest in the accession goods that is perfected before or within 15 days after the day the debtor obtains possession of the collateral.

(4) A secured party who has the right to remove accession goods from the whole shall exercise his right of removal in a manner that causes no greater damage or injury to the other goods or that puts the person who is in possession of the whole to any greater inconvenience than is necessarily incidental to the work of effecting removal of the accession goods from the other goods.

(5) Any person, other than the debtor, who has an interest in the other goods at the time the goods subject to a security interest become an accession to the other goods is entitled to reimbursement for any damage to his interest in the other goods resulting from the removal of the accession goods, but is not entitled to reimbursement for diminution in the value of the other goods resulting from the removal of the accession goods caused by the absence of the accession goods removed or by the necessity for replacement.

(6) The persons entitled to reimbursement as provided in subsection (5) may refuse permission to remove the accession goods until the secured party has given adequate security for the reimbursement.

(7) The secured party may apply to a court for an order:

(a) determining the persons entitled to reimbursement under this section;

(b) determining the amount and kind of security to be provided by the secured party;

(c) prescribing the depository for the security;

(d) dispensing with the consent of any or all of the persons mentioned in clause (a).

(8) A person having an interest in the other goods hat is subordinate to a security interest by virtue of subsection (1) may, before the accession goods have been removed from the other goods, retain the whole upon payment to the secured party of the amount secured by the security interest having priority over his interest.

(9) The secured party who has the right to remove accession goods from the whole shall serve, on each person known to him as having an interest in the other goods and on any person who has registered a financing statement indexed in the name of the debtor and referring to the other goods or according to the

serial number where such is required, a notice in writing of his intention shall contain:

(a) the name and address of the secured party;

(b) a description of the accession goods to be removed sufficient to enable them to be identified;

(c) the amount required to satisfy the obligations secured by his security interest;

(d) a description of the other goods sufficient to enable them to be identified; and

(e) a statement of the intention to remove the accession goods from the whole unless the amount secured is paid on or before a specified day that is not less than 12 days after service of the notice in accordance with subsection (10).

(10) A notice mentioned in subsection (9) shall be served at least 15 days before removal of the accession goods and may be served in accordance with subsection 67(1) or, in the case of a person who has registered a financing statement, by registered mail addressed to the post office address of the person to be served as it appears on the security agreement or financing statement.

(11) Any person entitled to receive a notice under subsection (9) may apply to a judge for an order postponing removal of the accession goods from the whole, and the judge may make any order that he considers just and reasonable.

* * *

(proposed Act)

38(1) In this section,

(a) "other goods" means goods to which an accession is installed or affixed,

(b) "the whole" means an accession and the goods to which the accession is installed or affixed,

(c) "secured party" includes a receiver.

(2) Except as provided in this section and in section 30, a security interest in goods that attaches before or at the time the goods become an accession has priority with respect to the goods over

a claim to the goods as accession made by a person with an interest in the whole.

(3) A security interest referred to in subsection (2) is subordinate to the interest of

(a) a person who acquires for value an interest in the whole after the goods become an accession including an assignee for value of a person with an interest in the whole at the time the goods become an accession, and

(b) any person with a security interest taken and perfected in the whole who

(i) makes an advance under a security agreements after the goods become a accession, but only with respect to such advance, or

(ii) acquires the right to retain the whole in satisfaction of the obligation secured,

without knowledge of the security interest in the accession and before it is perfected.

(4) A security interest in goods that attaches after the goods becomes an accession is subordinate to the interest of a person who:

(a) has an interest in the other goods at the time the goods become an accession and who

(i) has not consented to the security interest,

(ii) has not disclaimed an interest in the goods or accessions,

(iii) has not entered into an agreement under which a person is entitled to remove the accession , or

(iv) is not otherwise precluded from preventing the debtor from removing the accession, or

(b) acquires an interest in the whole after the goods become an accession, if such interest is acquired without knowledge and before the security interest in the accession is perfected.

(5) A security interest referred to in subsections (2) and (4) is subordinate to the interest of a creditor or a sheriff who has seized or caused the whole to be seized under legal process to enforce a judgment, if the seizure occurs under circumstances referred to in section 20 and if the security interest is not perfected at the date of seizure.

(6) The interest of a creditor or a sheriff referred to in subsection (5) does not take priority over a purchase money security interest in goods that is perfected not later than 15 days after the goods become an accession.

(7) A secured party who, under this Act, has the right to remove accession goods from the whole shall exercise this right of removal in a manner that causes no greater damage or injury to the whole or the other goods or that puts the person in possession of the whole to greater inconvenience that is necessarily incidental to the removal of the accession goods.

(8) A person, other than the debtor, who has an interest in the whole at the time the goods subject to the security interest become an accession is entitled to reimbursement for any damages to the interest of such person in the whole caused during the removal of the accession goods, but is not entitled to reimbursement for diminution in the value of the whole caused by the absence of the accession goods removed or by the necessity of replacement.

(9) The person entitled to reimbursement as provided in subsection (8) may refuse permission to remove the accession until the secured party has given adequate security for the reimbursement.

(10) The secured party may apply to a court for one or more of the following

(a) an order determining the person entitled to reimbursement under this section,

(b) an order determining the amount and kind of security to be provided by the secured party,

(c) an order prescribing the depository for the security,

(d) an order authorizing the removal of the goods without the provision of security for reimbursement under subsection (9).

(11) A person who has an interest in the whole that is subordinate to a security interest as provided in this section may, before the accession goods have been removed from the whole by the secured party, retain the accession on payment to the secured party of the lesser of

(a) the amount secured by the security interest entitled to priority, and

(b) the market value of the accession if the accession were removed from the other goods.

(12) The secured party who has a right to remove the accession from the whole shall give to each person

(a) who is known by the secured party to have an interest in the other goods or in the whole, and

(b) who has registered a financing statement

(i) using the name of the debtor and referring to the other goods, or

(ii) according to the serial number of the other goods if they are goods defined in the regulations as serial numbered goods.

a notice of the intention of the secured party to remove the accession, and the notice shall contain

(c) the name and address of the secured party,

(d) a description of the goods to be removed,

(e) the amount required to satisfy the obligations secured by the security interest,

(f) the market value of the accession,

(g) a description of the other goods, and

(h) a statement of intention to remove the accession unless the amount referred to in subsection (11) is paid on or before a specified date that is not less than 15 days after the notice is given in accordance with subsection (13).

(13) A notice referred to in subsection (12) shall be given in accordance with section 68 or by registered mail addressed to

the address of the person to be notified as it appears on the financing statement.

(14) A person entitled to receive a notice under subsection (12) may apply to a Court for an order postponing removal of the accession.

COMMENT

This section has greater practical significance than its counterpart, section 37 of the existing Act, because of the change in the definition of the term "accession". (See section 2(1)(a) and accompanying comment.) A much wider range of goods are "accessions" under the proposed Act than is the case under the common law test that is employed by the existing Act.

A number of refinements, structural changes and minor policy changes have been incorporated in section 38 of the proposed Act. Most of these parallel changes to section 36.

Sections 38(2) and (4) of the proposed Act are the equivalent of section 37(1) of the existing Act. Since the circumstances contemplated by subsection (1)(a) and the circumstances contemplated by subsection (1)(b) are very different and subject to a different priority regime, the Commission decided that the two should be included in separate subsections. Section 38(4) of the proposed Act provides a list of circumstances that are implicit in section 37(1)(b) of the existing Act. The Commission has decided that for the sake of clarity, these circumstances should be spelled out.

The most important differences between section 38 of the proposed Act and its counterpart in the existing Act are to be found in section 38(3) of the proposed Act. Under the proposed Act, the priority rights of persons who acquire rights in the whole are spelled out in greater detail. Further, two additional types of interest are brought into the priority scheme. Four types of interests in the whole are specifically addressed in the proposed Act. The first is "a person who acquires an interest for value in the whole after the goods become accessions". This would include a buyer or someone who takes a security interest in the whole. The term "purchaser" used in section 37(2)(a)(i) of the existing Act would encompass these interests. However, the more general designation of persons in this category was thought to be preferable. The second type of interest mentioned is that of an "assignee for value of a person with an interest in the whole at the time the goods become an accession". It is not clear that such a person would be protected under the existing Act. Generally, an assignee steps into the shoes of the assignor. If the assignor did not have priority, can the assignee have priority? The matter is resolved in the proposed Act in favour of the assignee since an assignee will rely on the Personal Property Registry in assessing the quantum of interest it is acquiring. Some clarity has been brought to the position

of a holder of a prior perfected security interest in the whole (the third type of interest) who makes or contracts to make future advances. The proposed Act makes it clear that these advances must be made or contracted for after the goods become accessions.

The fourth type of interest recognized in the proposed new section 38(3) is the interest of a secured party who acquires the right to retain the whole in satisfaction of the obligation secured before the security interest in the accession is registered. The Commission has concluded that, even though a secured party does not otherwise have priority over the interest of the holder of a security interest in the accession because the security interest in the whole was taken before the goods became accessions, such holder is entitled to know when it obtains a right to retain the whole, whether or not an accession is subject to a security interest. Without this knowledge, the secured party would have no alternative but to retain in trust the value of the accession for the duration of the limitation period.

Section 38(11) of the proposed Act makes explicit what may be implicit in section 37(8) of the existing Act. Under the proposed Act, the person with an interest in the whole may prevent removal of the accession by the secured party by paying to the secured party the lesser of the amount secured by the security interest and the market value of the accession. Under the existing Act, no mention is made of the right to pay the value of the accession. However, it can be effectively argued that "the amount secured by the security interest" in the accession cannot exceed the value of the accession. Any amount owing by the debtor in excess of the value of the accession will be unsecured or will be secured by collateral other than the accession. The Commission has decided to remove any doubt in the matter and make it clear that the person with an interest in the whole can pay the lesser of the amount secured and the market value of the accession.

(existing Act)

38(1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product or mass.

(2) Where more than one perfected security interest attaches to the product or mass, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest entitled to share bears to the sum of the obligations secured by all security interests.

(3) This section does not apply to a security interest in accession goods to which section 37 applies.

* * *

(proposed Act)

39(1) A perfected security interest in goods that subsequently become part of a product or mass continues in the product or mass if the goods are so manufactured, processed, assembled or commingled that their identity is lost in the product.

(2) Subject to subsection (4) and (6), where more than one perfected security interest continues in the same product or mass under subsection (1), and each was a security interest in separate goods, the security interests are entitled to share in the product or mass according to the ratio that the obligation secured by each security interest bears to the sum of the obligations secured by all security interests.

(3) For the purpose of section 35, perfection of a security interest in goods that subsequently become part of a product or mass shall also be treated as perfection of the interest in the product or mass.

(4) For the purpose of subsection (2), the obligation secured by a security interest does not exceed the market value of the goods at the date that the goods become part of the product or mass.

(5) Any priority that a perfected security interest that continues in the product or mass under section (1) has over a perfected security interest in the product or mass is limited to the value of the goods at the date that they became part of the product or mass.

(6) A perfected purchase money security interest in goods that continues in the product or mass has priority over a non-purchase money security interest

(a) in the goods that continues in the product or mass under subsection (1)

(b) in the product or mass, other than as inventory, given by the same debtor, and

(c) in the product or mass as inventory given by the same debtor if

(i) the secured party with the purchase money security interest gives a notice to the secured party with the non-purchase money security interest in the

product or mass who registered a financing statement containing a description of collateral that includes the product or mass before the identity of the goods is lost in the product or mass,

(ii) the notice contains a statement that the person giving the notice has acquired or expects to acquire a purchase money security interest in goods supplied to the debtor as inventory, and

(iii) the notice is given before the identity of the goods is lost in the product or mass.

(7) A notice referred to in subsection (6)(c) may be given in accordance with section 68 or by registered mail addressed to the person to be notified as it appears in the financing statement referred to in subsection (6)(c).

(8) This section does not apply to a security interest in accession goods to which section 38 applies.

COMMENT

Section 38 of the existing Act is entirely inadequate to address the range of issues that can arise in the context of security interests in commingled goods. Section 39 of the proposed Act addresses the most important of these.

Section 39(1) states the basic proposition that a security interest in goods is not lost merely because the goods have lost their separate identity by becoming part of a product or mass. This feature of the proposed Act has its counterpart in section 38(1) of the existing Act. Unlike section 38(2) of the existing Act, section 39(2) of the proposed Act applies only to security interests in the product or mass that were separate security interests in the goods that went into the product or mass. Section 39(3) makes it clear that the perfected status of the separate security interests in the goods continues in the product or mass.

Section 39(4) is designed to remove any doubt as to the meaning of the term "obligation secured" in the subsection. The formula prescribed by section 39(2) works fairly only when it is realized that an obligation secured by a security interest in goods that become part of the product or mass cannot exceed the value of the goods. Any difference between the amount of debt and the value of the collateral is unsecured debt. While this was implicit in section 38(2) of the existing Act, the Commission has concluded that the point should be made clear through a special provision. Section 39(5)deals with a related issue. The purpose of section 39 is to protect a secured party holding a security interest in the goods that become part of the product or mass; it is not to enhance the security of such a

person at the expense of another lender holding a security interest in the product or mass. Section 39(5) is designed to ensure that this policy is implemented.

While there is no provision in section 39 that deals expressly with this point, the necessary implication of section 39(3), 39(5) and 35 is that, where there is a competition between a non-purchase security interest in the product or mass arising under section 39(1) and a security interest in the product or mass as original collateral, priority is determined on the basis of section 35(1).

Section 39(6) provides a set of rules for determining priority between purchase money and non-purchase money security interests in the goods and priority between purchase money security interests in the goods and security interests in the product or mass. The rules dealing with the latter parallel the rules of section 34. Accordingly, if the product or mass is inventory, the purchase money priority given to the security interest in the product or mass arising under section 39(1) has priority only if the holder of the security interest gives the prescribed notice to the holder of a prior registered security interest in the product or mass as original collateral. No such notice is required where the product or mass is equipment.

(existing Act)

39 A secured party may, in the security agreement or otherwise, subordinate his security interest to any other security interest.

* * *

(proposed Act)

40 A secured party may, in a security agreement or otherwise, subordinate the secured party's security interest to any other interest, and such subordination is effective according to its terms between the parties and may be enforced by a third party if such third party is the person or one of a class of person for whose benefit the subordination was intended.

COMMENT

The counterpart to this section is section 39 of the existing Act. Section 40 of the proposed Act removes the doubt associated with section 39 of the existing Act as to whether or not a subordination agreement can be enforced by a third party who is not a party to the subordination agreement but for whose benefit the agreement was made.

PROPOSED ACT S. ---	EXISTING ACT S. 40

(existing Act)

40(1) Unless a debtor on an intangible or chattel paper has made an enforceable agreement not to assert defences or claims arising out of a contract, the rights of an assignee are subject to:

(a) all of the terms of the contract between the debtor on an intangible or chattel paper and the assignor and any defence or claim arising therefrom; and

(b) any other defence or claim of the debtor on an intangible or chattel paper against the assignor that accrued before the debtor on an intangible or chattel paper received notice of the assignment.

(2) So far as the right to payment under an assigned contract right has not been earned by performance and notwithstanding notification of the assignment, any modification of or a substitution for the contract, made in good faith and in accordance with reasonable commercial standards and without material adverse effect upon the assignee's right under or the assignor's ability to perform the contract, is effective against an assignee unless the debtor on an intangible or chattel paper has otherwise agreed, but the assignee acquires corresponding rights under the modified or substituted contract.

(3) Nothing in subsection (2) affects the validity of a term in an assignment agreement which provides that a modification or substitution mentioned in that subsection is a breach of the agreement by the assignor.

(4) The debtor on an intangible or chattel paper may pay the assignor until he receives notice that the amount due or to become due under an identified transaction has been assigned and that payment is to be made to the assignee.

(5) A debtor on an intangible or chattel paper may pay the assignor if the assignee, when requested to do so by the debtor, fails to furnish to the debtor proof within a reasonable time that the assignment has been made.

(6) A term in any contract between a debtor on an intangible and an assignor which prohibits assignment of the whole of an account or intangible for money due or to become due is void.

* * *

(proposed Act)

41(1) In this section "account debtor" means a person who is obligated under an intangible or chattel paper.

(2) Unless the account debtor on an intangible or chattel paper has made an enforceable agreement not to assert defences to claims arising out of a contract, the rights of an assignee of the intangible or chattel paper are subject to

(a) The terms of the contract between the account debtor and the assignor and any defense or claim arising from the contract or a closely connected contract, and

(b) any other defence or claim of the account debtor against the assignor that accrues before the account debtor acquires knowledge of the assignment.

(3) A modification of or substitution for a contract made in good faith and in accordance with reasonable commercial standard and without material adverse effect of the assignee's rights under the contract or the assignor's ability to perform the contract is effective against the assignee unless the account debtor has otherwise agreed.

(4) Subsection (3) applies

(a) to the extent that an assigned right to payment arising out of the contract has not been earned by performance,

(b) notwithstanding that there has been notice of the assignment to the account debtor.

(5) Where the contract has been substituted or modified in the manner referred to in subsection (3), the assignee obtains rights that correspond to those that the assignee had under the original contract.

(6) Nothing in subsection (3) to (5) affects the validity of a term in an assignment agreement that provides that a modification or substitution referred to in that subsection is a breach of contract by the assignor.

(7) Where collateral which is either an intangible or chattel paper is assigned, the account debtor may make payments under the contract to the assignor

(a) before the account debtor receives a notice that

(i) states that the amount payable or to become payable under the contract has been assigned and payment is to made to the assignee, and

(ii) identifies the contract under which the amount payable is to become payable, or

(b) after

(i) the account debtor requests the assignee to furnish proof of the assignment, and

(ii) the assignee fails to furnish proof within 15 days from the date of the request.

(8) Payment by an account debtor to an assignee pursuant to a notice referred to in clause 7(a) discharges the obligation of the account debtor to the extent of the payment.

(9) A term in a contract between a debtor on an account or chattel paper and an assignor that prohibits or restricts assignment of the whole of the account or chattel paper for money for or to become due is binding on the asignor, but only to the extent of making the assignor liable in damages for breach of contract, but is unenforceable against third parties.

COMMENT

Section 41 of the proposed Act contains modifications and refinements of several aspects of section 40 of the existing Act.

Section 41(1) removes ambiguity in the existing Act as to who is the "debtor" referred to. An account debtor is not the "debtor" under a security agreement (or deemed security agreement) providing for a security interest in an account or chattel paper. The account debtor is the person who owes the account to the debtor or is the person obligated to the debtor under the chattel paper.

Section 41(2)(a) of the proposed Act subjects the assignee to defences or claims that the account debtor can raise against the assignor arising not only out of the contract under which the account or obligation arose (as is provided in section 40(1)(b) of the existing Act) but also under a closely connected contacts contract. This additional feature is a reflection of recent judicial modifications to the law of choses in action. (See Holt v. Telford [1987] 6 W.W.R. 385 (S.C.C.).)

Section 41(7) is the counterpart of sections 40(4)-(5) of the existing Act. Apart from the drafting style, the only difference between the provisions is that

a specified period of time for furnishing of proof of the assignment is set out in the proposed Act.

There is no equivalent in the existing Act to section 41(8) of the proposed Act. This provision eliminates uncertainty as to the position of an account debtor when he or she pays the account to someone after receiving notice that such person is an assignee entitled to be paid. This is so whether the notice was given by the assignor or someone claiming to be an assignee.

Section 40(6) of the existing Act is the equivalent of section 41(9) of the proposed Act. There are, however, important differences between the two provisions. Section 40(6) renders void a clause in a contract that purports to prevent the assignment of the whole of an account or chattel paper arising under the contract. While section 41(9) of the proposed Act retains the basic policy of section 40(6), it does so in a somewhat more refined way. Under section 41(9) the clause is not void; the clause is effective so as to give to the party for whose benefit it was included in the contract a right to collect damages for its breach. However, it is ineffective to prevent the transfer of the interest from occurring, and its breach or possible breach cannot be the basis for an injunction against the other contracting party preventing the transfer of the account or chattel paper.

PART IV

REGISTRATION

(existing Act)

41 A registration system, to be known as the Personal Property Registry, is hereby established for the purposes of registration under this Act and for registrations that are authorized or required under any other Act to be made in the registry.

42(1) The Minister of Justice shall appoint an official, to be known as the Registrar of Personal Property Security, and any deputy registrars that may be required for the proper operation of the registry.

(2) The registrar shall, under the direction of the Minister of Justice, supervise the operation of the registry.

(3) The registrar may designate one or more persons or deputy registrars on the staff of his office to act on his behalf.

* * *

(proposed Act)

42(1) The Personal Property Registry established under section 41 of The Personal Property Security Act, 1979-80, c. P-6.1 is hereby continued for the purposes of registrations under this Act, under prior registration law and under any other Act, that are permitted or required to be made in the Registry.

(2) The office of Registrar of Personal Property as established under section 42 of The Personal Property Security Act, 1979-80, c. P-6.1 is hereby continued and the registrar and deputy registrars shall continue until they are replaced by the Minister of Justice.

(3) The registrar and deputy registrars shall continue to supervise the registry under the direction of the Minister of Justice and shall have such powers and obligations as set out in this Act and any other Act providing for registration in the Personal Property Registry and as prescibed in regulations to this Act or any other Act providing for registration in the Personal Property Registry.

PROPOSED ACT S. 42(4) EXISTING ACT S. 44(1)

(4) **Notwithstanding any regulation made under this Act or any other Act providing for registration in the Personal Property Registry, when, in the opinion of the registrar, the circumstances are such that it is not practical to provide one or more registry services, the registrar may**

(a) refuse to register financing statements,

(b) refuse to accept requests for search results, and

(c) otherwise suspend one or more of the functions of the registry,

for the period of time during which, in the opinion of the registrar, those circumstances prevail.

COMMENT

The Commission concluded that Part IV of the existing Act is unnecessarily confusing because of the illogical ordering of its sections and because it leaves a few important issues to implication. In addition, it was the conclusion of the Commission that it is necessary to reverse or modify the legal effect of some of the case law interpreting the key provisions of the registry system of the present Act. Consequently, Part IV of the proposed Act looks very different in some respects from its counterpart in the existing Act.

This section would replace sections 41 and 42 of the existing Act. Some of the differences between the section and its counterparts in the existing Act are dictated by the fact that the Personal Property Security Registry is not newly created under the new Act but is merely continued.

There is no equivalent in the existing Act to section 42(4). This provision is necessary in order to give to the registrar power to deal with equipment or power failures, labour trouble or any other event that interferes with the operation of the system. It will be noted that the registrar is empowered to keep some of the registry functions operational while other functions are shut down.

(existing Act)

44(1) A financing statement or financing change statement may be tendered for registration, by personal delivery or by mail, at the office of the registry in Regina, and the registration of the document is effective from the time assigned to the document by the registrar.

(2) Except as otherwise provided in this Act, a financing statement may be registered at any time and may be registered before a security agreement is made or before a security interest attaches.

52(1) Where, in the opinion of the registrar or deputy registrar, a document tendered for registration in the registry does not comply with this Act or the regulations or with any other Act under which registration of the document in the registry is authorized, he may refuse to register it, and shall give the reason why he is of the opinion that it does not comply.

66(1) The validity or effectiveness of a document to which this Act applies is not affected by reason of a defect, irregularity, omission or error therein or in the execution or registration thereof unless the defect, irregularity, omission or error is seriously misleading.

(2) Failure to provide a description required by this Act or the regulations in relation to any type or kind of collateral in a document does not affect the validity or effectiveness of the document as it relates to any other collateral.

* * *

(proposed Act)

43(1) A financing statement may be submitted for registration at an office of the registry as prescribed.

(2) Registration of a financing statement is effective from the time assigned to it at the registry and where two or more financing statements are assigned at the same date, the order of registration is determined by reference to the registration numbers assigned to them at the registry.

(3) The Registrar shall not register a financing statement or issue a search result under this Part until such fees as are prescribed in respect of registrations or searches, as the case may be, have been paid, or arrangements for their payment have been made.

(4) A financing statement may be registered before a security agreement is made and before a security interest attaches.

(5) A registration may relate to one or more than one security agreement.

(6) The validity of the registration of a financing statement is not affected by a defect, irregularity, omission or error in the financing statement or in the registration of it unless the defect, irregularity, omission or error is seriously misleading.

(7) Subject to subsection (9), where one or more debtors are required to be disclosed in a financing statement or where collateral is consumer goods of a kind that are prescribed by the regulations as serial numbered goods, and there is a seriously misleading defect, irregularity, ommission or error in

(a) the disclosure of the name of any of the debtors, other than a debtor who does not own or have rights in the collateral or,

(b) the serial number of the collateral,

the registration is invalid.

(8) Nothing in subsection (6) or (7) requires as a condition to a finding that a defect, irregularity, omission or error is seriously misleading, proof that anyone was actually misled by it.

(9) Failure to provide a description in a financing statement in relation to any item or kind of collateral does not affect the validity of the registration with respect to other collateral.

(10) Notwithstanding anything in this Part, the Registrar may reject a financing statement when, in the opinion of the Registrar, it does not comply with this Act or the regulations or any other Act of regulation under which registration of a financing statement is authorized.

(11) The Registrar shall give the reason for the rejection of a financing statement under subsection (10).

[(12) Unless a person entitled to a copy has waived in writing the right under this section to receive it the secured party or person named as secured party in a financing statement shall give to each person named as debtor in the statement,

(a) a copy of the statement reproduced on paper,

(b) a copy of a verification statement relating to the financing statement and issued by the registry

not later than 30 days after it is registered or issued, as the case may be.]

COMMENT

Section 43(1) (proposed Act)

A comparison of section 43(1) of the proposed Act with section 44(1) of the existing Act reveals some important differences. The method of tender of a financing statement under the proposed Act is not specified in the legislation but is left to regulations. Section 44(1) of the existing Act is quite specific on the point. A financing statement can be tendered only by personal delivery or by mail. The open-ended approach embodied in section 43(1) reflects the view of the Commission that the registry system should be updated so as to be able to employ new technology and approaches that have been developed in British Columbia. In particular, the Commission recommends to the Minister of Justice that the registry system be modified so as to permit paperless registration in and searching of the database. In other words, users of the system should be able to electronically register financing statements through the use of computer terminals located in their offices or places of business or located in public facilities such as court houses and municipal offices without the need to send to the registry printed financing statements. Searches would also be obtained through the use of computer terminals. It is the view of the Commission that this is a very important feature of a system that is designed to serve residents in all parts of the province. Under the current system, those who live outside of Regina suffer significant disadvantage in having to rely on the mail service or on agents resident in Regina.

The Commission is recommending that a related facility be made generally available to users of the system. This facility would permit bulk registration. It would be available to large volume users such as larger credit union and bank branches. A branch that has a large volume of registrations would be permitted to accumulate "financing statements" and transmit them to the registry in bulk after business hours. Bulk registration was made available to the Saskatchewan Agricultural Development Corporation in 1988 to register the hundreds of "financing statements" registered in connection with the secured loans made by that organization.

Implementation of this approach necessitates the acceptance of the concept of a "financing statement" as registration data electronically transmitted to the registry. Since the system proposed by the Commission does not eliminate the use of printed financing statements of the kind currently in use, Part IV retains terminology reflecting a system in which printed financing statements are used. However, the term "financing statement" will be defined in the Act to refer to both printed financing statements and registration data transmitted to the registry. (See section 2(p) supra.)

Section 43(2) (proposed Act)

Another aspect of the modifications to the system that the Commission proposes is that there be no time lag between the date and time of registration and the time that a registration is searchable. In other words, it is the Commission's view that all registrations should be searchable with the result that a searching party is guaranteed that, subject to the need to take into account the "grace periods" provided by the Act, the information available from the registry displays all registerable security interests and charges against the collateral of a debtor.

That aspect of section 43(2) dealing with two or more financing statments with the same date has been retained to deal with situations where financing statements are sent to the registry by mail.

Section 43(3) (proposed Act)

This section will be an important feature of the new approach, under which it will no longer be possible to rely on the simple one-to-one relationship between the provision of a registry service and the payment for that particular service. Under the new approach the use of pre-paid accounts similar to those now in use in connection with the current telephone search facility will become much more common.

Section 43(5)

This section makes explicit what is implict under the existing Act.

Sections 43(6)-(9)

These sections deal with issues that have been the focus of a considerable amount of litigation under the existing Act.

Section 43(6) of the proposed Act is the equivalent of section 66(1) of the existing Act. The section has been relocated to Part IV since it would no longer apply to security agreements but would affect only financing statements.

One of the most controversial issues that has arisen in the context of section 66(1) of the existing Act is whether the test to be applied is a subjective test or an objective test. In other words, must there be evidence that someone was actually misled in order for a registration to be seriously misleading because of a defect, irregularity, omission or error in it? While the matter has yet to be addressed by the Saskatchewan Court of Appeal, it would appear that the balance

of opinion in the Court of Queen's Bench is that the test is subjective.[1] If this represents the current state of the law, the effect of section 43(8) would be to replace the subjective test with an objective test. The test is whether the deficiency in the registration is likely to be seriously misleading to persons who use the system. Whether or not someone was actually misled is not important.

There are important reasons why the Commission has decided to specify an objective test. A subjective test raises a fundamental question: what kind of defect, irregularity, error or omission amounts to non-compliance? Clearly the failure to fill in some important feature of a financing statement is so fundamental a deficiency as to amount to the equivalent of not registering a financing statement at all. For example, if the debtor is stated to be John Smith, when, in fact, the debtor is Peter Jones, can it be said that this is an effective registration of a security interest in the property of Peter Jones merely because someone was not misled? Even in the face of statutorily prescribed subjective tests set out in The Conditional Sales Act and The Bills of Sale Act, Saskatchewan courts required that there were minimum requirements that had to be met before a registration could be considered to have been effected.[2] If this approach is followed in the context of section 66(1) of the existing Act, it is clear that the test is not purely subjective. The test has an objective element to it.[3]

Another difficulty with a subjective test is that it appears to be inconsistent with the spirit of section 20(1)(b) of the Act. This section gives to a trustee in bankruptcy an independent status to subordinate unperfected security interests. The basis for this status is that once a debtor becomes a bankrupt, the judgment enforcement rights of his or her creditors are vested in the trustee and can no longer be enforced by individual creditors.[4] After bankruptcy, the trustee exercises the subordinating power that the unsecured creditors has lost through the operation of the Bankruptcy Act. A subjective test would mean that nothing short of complete non-compliance with the registration requirements of the Act would result in a security interest being subordinated to a trustee in bankruptcy. It is difficult to see how a trustee can be actually misled. A trustee does not take

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[1] See e.g. Ford Credit Canada Ltd. v. Percival Mercury Sales Ltd. [1984] 5 W.W.R. 714, affd. on other grounds [1986] 6 W.W.R. 569 (C.A.); Re Bell's Dairy Ltd. (1984-85), 35 Sask. R. 187 (Q.B.) reversed on other grounds, [1986] 6 W.W.R. 161 (C.A.); Elmcrest Furniture Ltd. v. Price Waterhouse (1985), 41 Sask. R. 125 (Q.B.); Carson Restaurants International Ltd. v. A-1 United Restaurant Supply Ltd. (1989) 1 W.W.R. 268 (Sask. Q.B.) 8 PPSAC 276.

[2] See Clarkson Co. Ltd. v. G.T.E. Sylvania Canada Corp. (1978), 85 D.L.R. (3d) 763 (Sask. Q.B.); Re Bushman and Leoville Credit Union Ltd. (1970), 13 D.L.R.(3d) 240 (Sask. Q.B.); Iverson v. Sherman (1967), 59 W.W.R. 252 (Sask. Q.B.).

[3] However, see Wimmer J.in Elmcrest Furniture Ltd. v. Price Waterhouse (1985), 41 Sask. R. 125 (Q.B.) at 127.

[4] Bankruptcy Act R.S.C. 1985, c. B-3, s. 70(1).

a security interest in or purchase the bankrupt's property. Nor is a trustee likely to suffer anything more than temporary inconvenience or minor cost when proceeding on the basis of incorrect or incomplete information acquired from the registry.

Another major problem with a subjective test was noted by Professor R. Cuming, in "Judicial Treatment of the Saskatchewan Personal Property Security Act".[5]

> By far the most troublesome by-product of a subjective approach is circular priorities. Implicit in the approach taken by the Court in the Elmcrest case [Elmcrest Furniture Ltd. v. Price Waterhouse (1985), 41 Sask. R. 125 (Q.B.)] is the suggestion that a security interest can be valid against one competing interest because the holder of that interest was not misled by non-compliance with registration requirements, but subordinate to another competing interest because a holder of it was actually misled by non-compliance. The problem is demonstrated in the following scenario. Assume that SPI, a secured party, registered a financing statement, but failed to include an accurate description of the collateral. Assume that SPII, another secured party, took a security interest in the same collateral but did so without conducting a search of the registry. SPIII, another secured party, also took a security interest in the collateral but did so only after obtaining a search result which disclosed SPI's and SPII's security interest but which led SPIII to conclude that the collateral was encumbered only by SPII's security interest. If a subjective test is read into section 66(10, a court would be forced to conclude that SPI has priority over SPII, SPII has priority over SPIII, but SPIII has priority over SPI. While circular priorities cannot always be avoided, there must be a strong public policy basis for adopting rules that carry with them a significant potential for creating circular priority problems.

The final argument against a subjective test is that it re-introduces into the registry system difficult issues of proof and accompanying uncertainty of outcome that have been eliminated in other features of the Act. For example, under section 35(1), priority goes to the first security interest that is registered, whether or not the holder of that security interest had or did not have knowledge of the existence of a prior unperfected security interest. The reason for this approach is the assumption that most business activity requires clear-cut rules that produce predictable outcomes. It is not helpful to have outcomes depend upon difficult findings of fact as to the state of mind of the persons involved. While this approach has not been applied with complete consistency throughout the Act, it is a dominant feature of relations between creditors or a debtor. It is the conclusion

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[5] (1986-87), 51 Sask. Law Rev. 129 at 139-40.

of the Commission that a radical departure from this approach should not be introduced through the use of a subjective test.

Section 43(7) (proposed Act)

This section has no counterpart in the existing Act. The section deals with two separate situations. The first is where there are two or more debtors but there is a seriously misleading defect, irregularity, omission or error in the name of at least one of the debtors. The section declares such a registration to be invalid. The Commission has concluded that the provision states a rule that is fundamental to the proper functioning of the registry system. If both A and B are owners of the collateral and are debtors under the security agreement, it is not sufficient that only A is described in the registration as the debtor when B offers to sell the collateral to C who is unaware of the existence of A. In order for C to get the protection that the public expects from the system, a search of the registry using B's name as the search criterion should disclose the security interest. It is not enough to conclude that, had C used A's name as the search criterion, he would have discovered the registration of the security interest.

The second feature of section 43(7) addresses the issue of compliance when the collateral is the type that under the registry regulations must be described in detail (that is, by make, model and serial number). In such a situation, the system provides to a searching party two search criteria: the debtor's name and the serial number of the collateral. In Ford Credit Canada Ltd. v. Touche Ross Ltd.,[6] the Saskatchewan Court of Appeal held that, where the collateral was described in detail but the manner of identification of the debtor on financing statement was so defective as to be seriously misleading, the registration was nevertheless valid as not being seriously misleading since a searching party had available the serial number which, if used as the search criterion, would have revealed the registration.

The Commission has concluded that the proposed Act should not be susceptible to this interpretation. Section 43(7) requires that both search criteria be included in the registration in a form that is not seriously misleading. There are several reasons for this conclusion. Some of these reasons have already been stated in the context of the discussion of section 43(6). The problems associated with the decision in the Ford Credit case have been described by Professor Cuming in "Judicial Treatment of the Saskatchewan Personal Property Security Act".[7]

> Without serial number registration, there will be situations in which a searching party will not be able to discover the existence of a registered financing statement. This is so because in such cases the

[6] [1986] 6 W.W.R. 569

[7] Supra note 6 at 141-45.

only search criterion available will be the debtor's name, and the person is dealing with is not the debtor named in the financing statement. For example, if A takes a security interest in an item of collateral owned by B, and B then sells the item to C, who offers it as collateral to secure a loan from D, unless D can use the serial number of the collateral as the search criterion, all he can do is to obtain a search result using C's name as the search criterion. Since B, not C, is the debtor named in the financing statement, D's search will not reveal A's security interest. If D can use the serial number of the collateral as a search criterion, his search will reveal A's security interest if A has complied with the requirements that this serial number be recorded on his financing statement. It will be noted that X (a person who deals with B) is in a different position than that of D. If X wants to determine whether or not there exists a perfected security interest in the item, two search criteria are available: the debtor's name and the collateral serial number. D has only the serial number.....

If the two registration-search criteria are alternatives, in the context of X's position, proper recording of either one of them would be sufficient compliance; but in the context of D's position, proper recording of the serial number is required.....

There are at least two practical difficulties endemic to this approach. The first is the potential for circular priority problems. Assume that B gives a security interest in the collateral to X before he sells it to C. Assume as well that A's financing statement correctly recorded B's name but failed to record the collateral serial number. In the context of X's position the two criteria are true alternatives. A's security interest has priority over X's security interest, and X's security interest (assuming that it has been properly perfected) has priority over D's security interest; but D's security interest has priority over A's security interest.

The second difficulty which this approach entails will be encountered in the situation where the debtor's trustee in bankruptcy is seeking to have the registration declared invalid. There is no way of determining whether the trustee occupies a position like that of X or a position like that of D. Indeed, there is no basis on which to conclude that his position must be indentified with either that of X or D.

The Ford Motor Credit decision may be read as establishing not that the debtor name and the serial number of the collateral are not true alternatives but that the serial number of the collateral is the only one that is required. The Commission has concluded that this approach should not be embodied in the proposed Act. There are practical reasons why a searching party may want to rely on the debtor's name as a search criterion, even where the collateral must be

described by serial number. For example, if equipment that is taken as collateral is not readily available to a prospective lender so that the serial numbers can be checked, the important search criterion is the debtor's name. To deny the prospective lender the opportunity to rely on this search criterion is to rob the system of some of its usefulness. The same prospective lender must be able to use the debtor's name as a search criterion for security interests in collateral that need not be described by serial number and for writs of execution, whatever the nature of the collateral. It makes little practical sense to deny efficacy to a debtor-name search with respect to some types of collateral and not others or with respect to some types of interests and not others.

The Commission has concluded that the registry system is much more efficient and much less confusing to users when the debtor's name is treated as the universal registration-search criterion for all types of collateral and all types of transactions falling within the system. While the collateral serial number as a registration-search criterion provides a measure of protection to persons for whom the debtor-name search criterion is not useful because they are unaware of the debtor's name, it is not a substitute for the debtor-name registration-search criterion. There are commercially important situations where searching parties may want to rely on both or either registration-search criteria. Section 43(6) of the proposed Act permits them to do this.

Section 43(12)

A central feature of the existing and proposed Acts is the great flexibility that they afford to secured parties or prospective secured parties when it comes to registration of financing statements. Under the existing Act, it is possible for a prospective creditor to register a financing statement having a registration life of infinity and claiming a security interest in all of a named person's present and after-acquired property. This can all be done without the consent or knowledge of the person named as debtor in the registration. This is permitted since the Act provides in section 50 an efficient method under which the person named as debtor can require the registration to be discharged or corrected so as to reflect the legal relationship, if any, between that person and the prospective creditor. This system would be retained under the proposed Act. However, the Commission has concluded that a few additional measures are required in order to provide a fairer balance between the flexibility given prospective creditors and the rights of persons not to suffer loss or incovenience as a result of abuse of that flexibility. One of these measures is contained in section 43(12).

The section requires that a secured party who has registered a financing statement give a copy of the financing statement or a copy of a verification statement relating to the financing statement to the person named in the statement as debtor. Where the registration is effected by electronic transmission of registration data rather than through tender of a printed financing statement, the registering party must provide a verification statement since there will be no "hard copy" of the financing statement. The purpose of the section is to ensure

that the person named as debtor in the registration is informed of the existence and nature of a registration that might affect his or her future ability to obtain credit. Such person can then take the steps prescribed in section 50 to have the registration discharged or amended so as to reflect accurately his or her legal relationship, if any, with the person who registered the financing statement.

It will be noted that the section 43(12) is in brackets. A Committee of Saskatchewan practitioners, which provided advice to the Commission in connection with this report, recommended that the section be replaced by a requirement in the regulations that the Registrar send to each person identified as a debtor on a financing statement a copy of the verification statement that is sent to the registering party. The Commission has not explored the full implications of this suggestion. It has noted that the Ontario, British Columbia and Alberta Acts all require that the secured party and not the Registrar provide the notice of a registration to the person named as debtor in the registration. However, the Commission has concluded that should further investigation of this matter disclose that it is cost-efficient to have the persons named as debtors notified by the Registrar rather than by the secured party, it is prepared to recommend that section 43(12) be deleted from the Act.

(existing Act)

46 An amendment, in the prescribed form, to a financing statement or other document registered under this Act may be registered at any time during the period that the registration of the amended document is effective, and the amendment is effectively registered as to the change from the time of registration of the amendment.

48(1) Where a financing statement has been registered with respect to a security interest, the registration may be renewed at any time before the document to which it refers expires by registering a financing change statement.

(2) Subject to the regulations, registration under this Act of:

(a) a financing statement is effective for the length of time indicated on the financing statement;

(b) a financing change statement renewing the registration is effective for the length of time indicated on the financing change statement;

(c) any other document is effective for the remainder of the period for which the financing statement to which the

document relates or any financing change statement is effective.

* * *

(proposed Act)

44(1) Except as otherwise prescribed, a registration under this Act is effective for the period of time indicated on the financing statement by which the registration was effected.

(2) A registration may be renewed by registering a financing change statement at any time before the registration expires, and, except as prescribed, the period of time for which the registration is effective shall be extended by the renewal period indicated on the financing change statement.

(3) An amendment to a registration may be effected by registering a financing change statement at any time during the period that the registration is effective, and the amendment is effective from the time when the financing change statement is registered to the expiry of the registration being amended.

(4) When an amendment of a registration is not otherwise provided for in this part, a financing change statement may be registered to amend the registration.

COMMENT

Section 44(2) differs from its counterpart, section 48(1)-(2) of the existing Act, in that it provides that the period of renewal begins at the end of the original registration period. Under section 48 of the existing Act, the renewal period begins to run as of the date of registration of the financing change statement.

(existing Act)

45(1) Where a financing statement is registered and the secured party has assigned his interest, a financing change statement in the prescribed form may be registered.

(2) Where a part of the collateral is assigned, the financing change statement shall so indicate and shall contain a prescribed description of the assigned collateral.

(3) Where no financing statement has been registered with respect to a security interest and the secured party has assigned his interest, a financing statement may be registered in which the assignee is disclosed as the secured party.

(4) After disclosure of an assignment or registration of a financing change statement under this section, the assignee is the secured party.

(5) A financing statement disclosing an assignment may be registered before or after an agreement to assign the security interest has been completed.

47 Where a secured party has subordinated his interest to the interest of another person, a financing change statement may be registered at any time during the period that the registration of the subordinated interest is effective.

* * *

(proposed Act)

45(1) Where a secured party with a registered security interest transfers the security interest or a part of it, a financing change statement may be registered disclosing the transfer.

(2) Where a financing change statement is registered under subsection (1) and an interest in part, but not all, of the collateral is transferred, the financing change statement shall contain a description of the collateral in which the interest is transferred.

(3) Where a secured party transfers an interest in collateral and the security interest of the secured party is not perfected by registration, a financing statement may be registered in which the transferee is disclosed as the secured party.

(4) A financing statement disclosing a transfer of a security interest may be registered before or after the transfer.

(5) After registration of a financing change statement disclosing a transfer of a security interest, the transferee is the secured party for the purposes of this Part.

(6) Where a security interest has been subordinated by the secured party to the interest of another person, a financing change statement may be registered to disclose the subordination at

any time during the period that the registration of the subordinated interest is effective.

COMMENT

Section 45 of the proposed Act consolidates sections 45 and 47 of the existing Act. However, the policies of the existing Act have not been changed.

(existing Act)

43(3) Where verbal search results are requested and the results of the search are, in the opinion of the registrar, of such length as to preclude verbal search results, the registrar may, after informing the person searching of his decision, forward by mail the printed results of the search.

48(3) Financing statements and financing change statements referring to a financing statement, or information provided on a financing statement or financing change statement, as the case may require, may be removed from the records of the registry:

(a) when the financing statement is no longer effective;

(b) upon the receipt of a financing change statement discharging or partially discharging the financing statement;

(c) when the secured party fails to register a judge's order maintaining the financing statement under subsection 50(4);

(d) upon receipt of a court order compelling the discharge or partial discharge of a financing statment or a financing change statement. 1979-80, c. P-6.1, s. 48.

52(5) When directed to do so by the Minister of Justice, the registrar shall cause any document registered in the registry to be photographed on microfilm and the microfilm, for the purposes of this Act or an Act authorizing registration in the registry, is deemed to be the document registered.

* * *

(proposed Act)

46(1) Where a financing statement is registered in the registry, the Registrar may have the statement photographed or otherwise reproduced and the reproduction is for all purposes deemed to be the statement photographed or reproduced.

(2) Information in a registration may be removed from the records of the registry

(a) when the registration is no longer effective,

(b) on the receipt of a financing change statement discharging or partially discharging the registration,

(c) if the secured party fails to submit to the Registrar a court order maintaining the registration under section 50, or

(d) on receipt of an order of a court compelling the discharge of partial discharge of a registration.

COMMENT

The differences between section 46 of the proposed Act and section 43(3) of the existing Act are cosmetic only.

(existing Act)

51 Registration of a document in the registry does not constitute constructive notice or knowledge of its contents to third parties.

* * *

(proposed Act)

47 Registration of a financing statement in the registry is not constructive notice or knowledge of its existence or contents to any person.

COMMENT

The minor differences between section 47 of the proposed Act and section 51 of the existing Act do not reflect any change in policy.

(existing Act)

43(1) Upon payment of the prescribed fee in the prescribed manner, any person may, in person at the office of the registry in Regina or by mail:

(a) requisition a search against the name of any individual or business debtor or according to the serial number of the collateral, if the collateral is required by the regulations to be described by serial number, and obtain the results of the search;

(b) requisition the printed results of the search mentioned in clause (a);

(c) obtain a certified copy of any registered document.

(2) Upon payment of the prescribed fee in the prescribed manner, a deputy registrar employed at a place other than Regina shall requisition, by telephone, telegraph message, or mail:

(a) verbal or printed search results of a search against the name of any individual or business debtor or according to the serial number of the collateral, if the collateral is required by the regulations to be described by serial number;

(b) a certified copy of any registered document.

(4) Requisitions authorized by subsection (2) may be made by persons other than the deputy registrar with the approval of the registrar.

(5) Where so approved by the Minister of Justice, searches may be requisitioned and provided in a manner other than that provided in subsection (1) or (2).

(6) The results of any search conducted under this section may contain information actively maintained for inquiries in the registry and may include information corresponding to search criteria similar to that provided by the person requisitioning the search.

(7) A printed search result issued under clause (1)(b) or (2)(a) or subsection (3) is receivable in evidence as *prima facie* proof of its contents.

(8) A copy of any registered document certified by the registrar, or by a deputy registrar designated to do so, is receivable in evidence as *prima facie* proof for all purposes, without proof of his signature or official position.

52(4) A certificate of the registrar or deputy registrar designated to sign certificates is receivable in evidence as *prima facie* proof of the time of the registration of a document, without proof of his signature or official position.

* * *

(proposed Act)

48(1) A person may request one or more of the following

(a) a search according to the name of a debtor and the issue of a search result,

(b) a search according to the serial number of goods of a kind that are prescribed by the regulations to be serial numbered goods and the issue of a search result,

(c) a search according to a registration number and the issue of a search result,

(d) a printed result of a search referred to in clauses (a) to (c),

(e) a copy or certified copy of any printed registered document.

(2) A printed search result that purports to be issued by the Registry is receivable as evidence as prima facie proof of its contents including

(a) the date of registration of a financing statement to which the search result refers, and

(b) the order of registration of the financing statement as indicated by the registration number.

(3) A copy of a printed registered financing statement or other registered document bearing the certification of the Registrar

is receivable in evidence as a true copy of the statement or document without proof of the signature or official position of the Registrar.

COMMENT

Rapid changes in technology permit the registry to offer new or improved services. In order to maintain the flexibility so as to be able to implement these services, it is important that the Act not freeze into legislative form current registry procedures. Section 43 of the existing Act does this. Section 45 of the proposed Act leaves to regulations many of the details as to how searches are to be made. For example, if remote, on-line search facilities are offered to the public, it may not be necessary to have a telephone search facility. Should a decision be made to eliminate this service, it would be cumbersome to have to amend the Act.

Section 48 of the proposed Act, however, does specify the search criteria that must be used by persons requesting search results. Section 48(1)(b) reflects the policy contained in sections 30(6)-(7) and 35(4) under which a secured party with a security interest in serial number goods held as equipment has the option of using the debtor name alone or along with the serial number of the equipment as the registration criterion.

Section 48(2) of the proposed Act addresses a weakness in 43(7) of the existing Act. Under the proposed provision, it is not necessary, as it appears to be under the existing Act, to prove that a search result was issued by the registry. So long as it purports to be so issued, it is receivable in evidence as prima facie proof of the facts recorded on it.

(existing Act)

52(2) Any document that is required or permitted to be registered under this Act must be the original.

(3) For the purposes of this Act a writing is deemed to be signed by a person when it is signed by the person or his agent.

(6) When directed to do so by the Minister of Justice, the registrar shall authorize the destruction of any books, documents, records, cards, papers or forms that have been preserved in the registry for so long that it appears that they need not be preserved any longer. 1979-80, c. P-6.1, s. 52; 1983, c. 11, s. 61.

* * *

(proposed Act)

There are no equivalent provisions in the proposed Act.

(existing Act)

54(1) In order to take priority over interests in real property according to section 36, a notice in the prescribed form shall be filed in the appropriate land titles office upon payment of the prescribed fee, and upon being so filed the registrar of the land titles office shall make a memorandum thereof on the certificate of title to the parcel of land to which the notice relates and on the condominium plan or replacement plan, as the case may require.

(2) Where a notice has been filed in the land titles office under subsection (1) and the filing of the notice has not expired, notice of a document renewing, amending, assigning or discharging the security interest to which the original notice relates, or of a document subordinating the security interest to another security interest, may be filed in the land titles office in the form prescribed, and, upon such filing, the registrar of the land titles office shall make a memorandum thereof on the proper certificate of title.

(3) Section 48 applies, *mutatis mutandis*, to any notice filed under this section.

(4) A security interest in fixtures may be perfected as a security interest in goods without a notice being filed under subsection (1).

(5) Where the filing of a notice of a security interest in fixtures expires, the registrar of the land titles office may vacate the filing of the notice and any other notice that relates to the same security interest and may strike out any memorandum thereof that is made on the certificate of title.

(6) A notice filed under subsection (1) or (2) may be discharged by filing a certificate in the prescribed form in the appropriate land titles office.

(7) Where a notice is filed under subsection (1) and:

(a) all the obligations under the security agreement are performed;

(b) it is agreed to release part of the collateral in which a security interest is taken upon payment or performance of certain of the obligations under the security agreement, then upon payment or performance of those obligations; or

(c) the notice purports to give the secured party a security interest in property of the debtor in which the secured party does not have, or is not entitled to claim, a security interest; any person having an interest in the collateral, the registered owner of the real property or any other person claiming an interest in the real property may contest the registration of the notice according to the procedure established in *The Land Titles Act* for contesting the filing of a caveat.

* * *

(proposed Act)

49(1) In this section,

(a) "debtor" includes any person named in a notice under this section as a debtor,

(b) "secured party" includes any person named in a notice under this section as a secured party.

(2) A security interest in a fixture under section 36, and a security interest in a growing crop under section 37 may be registered by tendering a notice as prescribed to the land titles office for the appropriate land registration district.

(3) The Registrar of the land titles office to which the notice in subsection (1) is tendered shall make a memorandum of the notice on the certificate of title or the condominium plan, as the case may be, in respect of the parcel of land to which the notice relates.

(4) If a notice has been registered in a land titles office under subsection (1) and the registration of the notice has not expired, notice of a renewal, amendment, transfer or discharge of the security interest to which the original notice relates, or a notice of a subordination of the security interest to another interest may be registered in the land titles office as prescribed, and on its being registered, the Registrar of the land titles office shall make a memorandum of it on the proper certificate of title or condominium plan, as the case may be.

(5) Subsections 43(4), (5), (6), (8), (9) and (12) and sections 44 and 45 apply, with all necessary modifications, to a notice registered under this section.

(6) If a notice registered under this section expires, or has been discharged, the Registrar of the land titles office in which it has been registered may remove registration of the notice in relation to the security interest and any other notice that relates to the same security interest.

(7) Where a notice is registered under this section and

(a) all of the obligations under the security agreement to which the notice relates have been performed,

(b) the secured party has agreed to release part or all of the collateral described in the notice,

(c) the description of the collateral contained in the notice includes an item of property that is not collateral under a security agreement between the secured party and the debtor, or

(d) no security agreement exists between the secured party and the debtor,

the debtor named in the notice and any person having a registered interest in the land may give a written demand to the secured party.

(8) The demand referred to in subsection (7) may require that

(a) in a case within subsection (7)(a) or (d), the registration of the notice be discharged,

(b) in a case within subsection (7)(b), the registration be amended or discharged, as the case may be, to reflect the terms of the agreement,

(c) in a case within subsection (7)(c), the collateral description on the notice be amended to exclude items of property that are not collateral under a security agreement between the secured party and the debtor,

and the secured party shall amend or discharge the registration of the notice accordingly not later than 15 days after the demand is given.

(9) Where the secured party fails to amend or discharge the registration of notice in accordance with the demand given pursuant to subsections (7) and (8), the debtor or any person having a registered interest in the land may require the Registrar of the land titles office to notify the secured party, in which case section 159 of The Land Titles Act applies, with all necessary modifications.

(10) The demand referred to in subsection (8) and the notice mentioned in subsection (9) may be given in accordance with section 68 or by registered mail addressed to the secured party as it appears on the notice registered under this section.

(11) Subsections (6) to (8) of section 50 apply with all the necessary modifications to a notice registered under this section.

(12) No fee or expense shall be charged and no account shall be accepted by a secured party for compliance with a demand made under subsections (7) and (8), unless the charge has been agreed to by the parties before the making of the demand.

COMMENT

While there are many differences between section 49 of the proposed Act and section 54 of the existing Act, none of these represent a difference in policy.

(existing Act)

50(1) Where a financing statement is registered and the collateral or proceeds, as the case may be, is released or partially released, the secured party shall discharge the registration, wholly or partially, as the case may require, by registering a financing change statement.

(2) No financing change statement mentioned in subsection (1) shall be registered unless financing change statements in respect of all assignments by the secured party or transfers by the debtor are registered.

(3) Where a financing statement is registered under this Act and:

(a) all the obligations under the security agreement to which it relates are performed;

(b) it is agreed to release part of the collateral in which a security interest is taken upon payment or performance of certain of the obligations under the security agreement, then upon payment or performance of such obligations; or

(c) it purports to give the secured party a security interest in property of the debtor in which the secured party does not have, or is not entitled to claim, a security interest;

any person having an interest in the collateral which is the subject of the security agreement, financing statement or financing change statement may serve a written demand on the secured party, demanding a financing change statement mentioned in subsection (1), and the secured party shall sign and deliver or send to the registry the financing change together with financing change statement in respect of all assignments by the secured party or transfers by the debtor in respect of which financing change statements have not been registered, within 15 days after a service of the demand.

(4) Where the secured party fails to deliver the required financing change statements within the time provided by subsection (3), the person who has made the demand may require the registrar to serve a notice in writing on the secured party stating that registration of the financing statement will be discharged or that a part of the collateral will be released, as the case may be, upon the expiration of 40 days after the day the registrar serves notice on the secured party, unless in the meantime the secured party registers with the registrar a judge's order accompanied by a financing change statement maintaining the registration of the interest of the secured party.

(5) The notice mentioned in subsection (3) or (4) may be served in accordance with subsection 67(1) or by registered mail addressed to the post office address of the secured party as it appears on the security agreement or financing statement.

(6) Upon application to a judge by the secured party, the judge may order that the registration of a financing statement:

(a) be maintained on any conditions and, subject to section 48, for any period of time that he considers just;

(b) be discharged or that a financing change statement, releasing the collateral or part of the collateral be registered, as the case may be.

(7) Subsection (4) does not apply to an agreement registered under *The Corporation Securities Registration Act* or to a financing statement or a financing change statement registered with respect to a security interest taken under a trust indenture where the financing statement indicates that the security agreement with respect to which the financing statement was registered is a trust indenture.

(8) Where the secured party under a registration to which *The Corporation Securities Registration Act* applies or under a trust indenture fails to deliver the financing change statements demanded in subsection 50(3), the person making the demand may apply to a judge, upon notice to all persons concerned, for an order directing that the financing statement or financing change statements be removed from the registry.

* * *

(proposed Act)

50(1) In this section,

(a) "debtor" includes any person named in a registered financing statement as a debtor,

(b) "secured party" includes any person named in a registered financing statement as a secured party.

(2) Where a registration relates exclusively to a security interest in consumer goods, the secured party shall discharge the registration not later than 30 days after all obligations under the security agreement creating the security interest are performed, unless prior to the expiry of that 30 days period the registration lapses.

(3) Where a financing statement is registered and

(a) all of the obligations under the security agreement to which it relates have been performed,

(b) the secured party has agreed to release part or all of the collateral described in the financing statement,

(c) the description of the collateral contained in the financing statement includes an item or kind of property that is not collateral under a security agreement between the secured party and the debtor, or

(d) no security agreement exists between the secured party and the debtor,

the debtor or any person with an interest in property that falls within the collateral description on the financing statement may give a written demand to the secured party.

(4) The demand referred to in subsection (3) may require that,

(a) in a case within subsections (3)(a) or (d), the registration be discharged,

(b) in a case within subsection (3)(b), the registration be amended or discharged as the case may be, so as to reflect the terms of the agreement, and

(c) in a case within subsection (3)(c), the collateral description be amended to exclude items or kinds of property that are not collateral under a security agreement between the secured party and the debtor,

and the secured party shall amend or discharge the registration accordingly not later than 15 days after the demand is given.

(5) If the secured party fails to amend or discharge the registration as required in subsection (4), the person giving the demand may require the Registrar to give a notice in writing to the secured party stating that the registration will be discharged or amended, as the case may be, in accordance with the demand on the expiry of 40 days after the day the Registrar gives the notice to the secured party, unless in the meantime the secured party registers an order of a court maintaining the registration.

(6) If the secured party fails to amend or discharge the registration as required by subsection (4) or fails to tender to the registrar a court order maintaining the registration, the registrar shall discharge or amend the registration in accordance with the demand on the expiry of 40 days after the day the Registrar gives the notice to the secured party as provided in subsection (5) or as soon thereafter as possible.

(7) The demand referred to in subsection (4) and the notice referred to in subsection (5) may be given in accordance with section 68 or by registered mail addressed to the secured party as it appears on the financing statement.

(8) On application to a court by the secured party, the court may order that the registration

(a) be maintained on any condition, and subject to section 44, for any period of time, or

(b) be discharged or amended.

(9) Subsections (5) and (6) do not apply to a registration of a security interest provided for in

(a) a security agreement registered under The Corporation Securities Registration Act, where the registration is continued under The Personal Property Security Act 1979-80, c. P-6.1 and under this Act, or

(b) a trust indenture if the financing statement through which the security interest was registered indicates that the security agreement providing for the security interest is a trust indenture.

(10) Where registration relates to a security interest referred to in subsection (9) and the secured party fails to amend or discharge the registration as required by subsection (4) the person making the demand may apply to a court for an order directing that the registration be amended or discharged.

(11) No fee or expense shall be charged and no amount shall be accepted by a secured party for compliance with a demand made under subsection (3), unless the charge has been agreed to by the parties before the making of the demand.

COMMENT

While section 50 of the proposed Act maintains the basic policy of section 50 of the existing Act, there is one important difference between the two provisions.

There is no equivalent in the existing Act to section 50(3). Under section 50(1) of the existing Act, there is a statutory requirement that a registration be discharged when the collateral is released. Under section 50(2) of the proposed Act, an obligation to discharge a registration once the obligation secured has been discharged arises only in connection with a security interest in consumer goods. There is an important reason for requiring a discharge in the case of a security interest in consumer goods but not in the case of a security interest in inventory or equipment. Where a consumer credit transaction is involved, it is unlikely that the parties will have the intention of entering into a series of agreements or will have an arrangement for the fluctating line of credit. Most secured consumer credit transactions involve a single obligation and not a continuing relationship under which a series of obligations are created. This being the case, it is

important that a registration involving consumer goods be discharged as soon as the obligation secured is discharged.

The picture is very different in the context of business financing. Frequently, the relationship between a business borrower and a commercial lender is long-term and involves a series of transactions over a period of years. This being the case, it is not in the interests of either party that a registration be discharged as soon as the obligation arising under one of the transactions is discharged. The Commission believes that the registry system should allow that registration to remain in effect so as to accommodate further secured transactions between the parties. This is the effect of section 50 of the proposed Act. In a business context, there is no requirement that a registration be discharged unless the debtor makes a demand under section 50(3).

Additional protection for a person against whose name or property a registration has been effected or maintained without authority is contained in section 65 of the proposed Act. Under this provision, the defendant in an action for damages for failure to discharge the registration can be required to pay deemed damages in an amount specified by regulations.

There is no equivalent in the existing Act to section 50(11) of the proposed Act. The purpose of the provision is to ensure that a person obligated to discharge a registration does not hold the person against whose name or property the registration has been effected to ransom. However, there is nothing in the provisionto prevent the parties from including in the security agreement that the debtor will pay a fee for discharge of a registration.

(existing Act)

49(1) Where a security interest has been perfected by registration and the debtor has the consent of the secured party to transfer his interest in the collateral or part of the collateral, the transferee is deemed to be the debtor for the purposes of registration, and the security interest is unperfected as against any interest arising subsequent to the transfer and before the secured party registers a financing change statement amending the original financing statement.

(2) Where a security interest has been perfected by registration and the secured party has notice that:

(a) the debtor has:

(i) transferred his interest in the collateral or part of the collateral; or

(ii) changed his name;

the security interest as against any interest arising subsequent to the transfer or change of name and before the secured party registers a financing change statement, is unperfected:

(iii) where the secured party has notice that the debtor has transferred his interest in the collateral or part of the collateral, 15 days after the secured party has notice of the debtor's transfer;

(iv) where the secured party has notice that the debtor has changed his name, 15 days after the secured party has notice of the debtor's change of name;

(b) the debtor is about to:

(i) transfer his interest in the collateral or part of the collateral; or

(ii) change his name;

the security interest, as against any interest arising subsequent to the transfer or change of name and before the secured party registers a financing change statement, is unperfected:

(iii) Where the secured party has notice that the debtor is about to transfer his interest in the collateral or part of the collateral;

(A) on the date of the transfer; or

(B) 15 days after the secured party has notice that the debtor is about to transfer his interest in the collateral or a part of the collateral; whichever is later;

(iv) where the secured party has notice that the debtor is about to change his name:

(A) on the date of the transfer; or

(B) 15 days after the secured party has notice that the debtor is about to change his name whichever is later.

(3) This section does not have the effect of unperfecting:

(a) a prior security interest, as defined in clause 72(1)(a), registered under a prior registration law, as defined in clause 72(1)(b); or

(b) a security interest in collateral that is required by the regulations to be and is described by its serial number in a registered financing statement.

(4) A security interest that becomes unperfected under this section may thereafter be perfected by registering a financing statement or as may otherwise be provided in this Act.

* * *

(proposed Act)

51(1) Where a security interest has been perfected by registration and all or part of the debtor's interest in the collateral is transferred by the debtor with the prior consent of the secured party, the security interest in the transferred collateral is subordinate to

(a) an interest, other than a security interest in that collateral, arising during the period from the expiry of the 15th day after the transfer to, but not including, the day the secured party amends the registration to disclose the name of the transferee of the interest in the collateral as the new debtor or takes possession of the collateral,

(b) a perfected security interest in the transferred collateral registered or perfected in the period referred to in clause (a), and

(c) a perfected security interest in the transferred collateral registered or perfected after the transfer and before the expiry of 15 days after the transfer if, before the expiry of the 15 days,

(i) the registration of the security interest first referred to in this subsection is not amended to disclose the transferee of the interest in the collateral as the new debtor, or

(ii) the secured party does not take possession of the collateral.

(2) Where a security interest is perfected by registration and the secured party has knowledge of

(a) information required to register a financing statement disclosing the transferee as the new debtor, all or part of the debtor's interest in the collateral is transferred by the debtor, or

(b) the new name of the debtor, where there has been a change in the debtor's name,

the security interest in the transferred collateral, where paragraph (a) applies, and in the collateral where clause (b) applies, is subordinate to

(c) an interest, other than a security interest in that collateral, arising during the period from the expiry of the 15th day after the secured party has knowledge of the information referred to in clause (a) or the name of the debtor, as the case may be, to, but not including, the day the secured party amends the registration to disclose the name of the transferee as the debtor, or to indicate the new name of the debtor, as the case may be, or takes possession of the collateral,

(d) a perfected security interest in that collateral registered or perfected in the period referred to in clause (c), or

(e) a perfected security interest in that collateral registered or perfected after the secured party has knowledge of the information referred to in clause (a) or the new name of the debtor, as the case may be, and before the expiry of the 15th day referred to in paragraph (c), if, before the expiry of the 15 days,

(i) the registration of the security interest first referred to in this subsection is not amended to disclose the transferee of the collateral as the new debtor or disclose the new name of the debtor, as the case may be, or

(ii) the secured party does not take possession of the collateral.

(3) This section does not have the effect of subordinating a prior security interest deemed by section 72 to be registered under this Act.

(4) Where the debtor's interest in part or all of the collateral is transferred by the debtor without the consent of the secured party and there are one or more subsequent transfers of the collateral without the consent of the secured party before the secured party acquires knowledge of the name of the most recent transferee, the secured party shall be deemed to have complied with subsection (2) if the secured party registers a financing change statement not later than 15 days after acquiring knowledge of

(a) the name of the most recent transferee who has possession of the collateral, and

(b) the information required to register a financing change statement,

and the secured party need not register financing change statement with respect to any intermediate transferee.

COMMENT

While the policies of section 49 of the existing Act have been carried over into section 51 of the proposed Act, there are several important differences between the two sections.

The apparent complexity of section 51 stems from the necessity to ensure that the priority structure of the section does not operate in an arbitrary and commercially unreasonable way. In order to do this it is necessary to segregrate out the different types of interests that are in competition with a secured party. Section 49 of the existing Act does not contain this degree of refinement. While it is much superior to the new Ontario Personal Property Security Act which simply renders a security interest unperfected for all purposes if the registration is not amended, it can produce commercially undesirable results.

So far as competing interests, other than competing security interests are concerned, a secured party has a 15 day grace period after a pre-approved transfer of the debtor's interest in the collateral or after knowledge of an unapproved transfer of the interest or change of the debtor's name during which to amend the registration to disclose the name of the transferee or the new name of the debtor. However, where the competing interest is that of another secured party, a different set of rules prevail. In this context it is necessary to distinguish between security interests that are perfected or registered during the 15 day period and security interests perfected or registered after the 15 day period and before amendment of the registration.

Where a competing security interest is either registered or perfected after expiry of the 15 day grace period and before the registration is amended, it has priority. Note that all that is required is that the competing security interest be perfected at some time. It need not be perfected during the period between the expiry of the grace period and the amendment of the registration. All that is required is that it be registered during this period. It can be perfected at a later time. This approach is in line with section 35(1) that gives priority to the first registered, not necessarily the first perfected security interest.

Where a competing security interest is either registered or perfected during the 15 day grace period and the registration is not amended, the competing security interest has priority. Without this provision, the 15 day grace period would become a period of temporary, unconditional protection. The problem that the provision addresses is displayed in the following scenario:

> Assume that SP1 has a security interest in the collateral of D that is perfected by registration. Assume that D changes its name and the change comes to the attention of SP1. However, SP1 takes no steps to amend its registration to reflect the change in name.
>
> During the period of 15 days after SP1 acquires knowledge of the change of name, SP2 takes a security interest in D's collateral and perfects it by registration.

If section 51(2)(e) were not in the Act, SP1 would have priority over SP2 even though SP1 never amended the registration disclosing the debtor's new name. This would put SP2 in an impossible position, since the registry would be of no value. The effect of sections 51(1)(c) and 51(2)(e) is to give to SP1 a conditional grace period. If the condition is not fulfilled, SP2 can take the benefit of the first in time registration rule of section 35(1).

Section 51 contains other refinements not found in section 49 of the existing Act. Under section 51(2), the secured party is under an obligation to amend the registration to disclose the name of the transferee until he acquires information that is required to register a financing statement. Under section 49(2) of the existing Act, mere knowledge of the fact of the transfer triggers the requirement to amend the registration.

Under section 51(4), a secured party need not amend his registration to reflect all transfers where the collateral has been transferred several times after being transferred by the debtor. All that he needs to do is to amend the registration so as to disclose the most recent transferee.

There is no equivalent in the proposed Act to section 49(3)(b) of the existing Act. The drafters of this provision presumably concluded that, where goods are registered by serial number, no third party could be deceived by a transfer of the collateral or a change of name of the debtor since the serial number is always

available as a reliable search criterion. The Commission has taken the position that debtor name and collateral serial numbers are not alternative registration-search criteria. They are two aspects of a single search criterion. The basis for this approach is set out in the comment to section 43 above. It would be inconsistent to treat the situations contemplated by section 51 as in any way sui generis.

It will be noted that in subsections (2) and (4) there is a reference to the knowledge of the secured party. As to what constitutes knowledge, see sections 2(2) and section 65(3). The effect of these provisions is to prescribe an objective test of what constitutes "knowledge".

(existing Act)

53(1) Subject to the other provisions of this section, any person who suffers loss or damage, as a result of his reliance upon a prescribed registry document or printed search results that are incorrect because of an error in the operation of the registry, may bring an action against the registrar in the court for recovery of damages, but no award of damages to any single claimant shall exceed the prescribed amount.

(2) No action for damages under this section lies against the registrar unless it is commenced within one year after the time of the person's having suffered the loss or damage.

(3) Any action for recovery of damages under this section brought by a person shall be brought as an action on behalf of all other persons who relied on the same prescribed registry document or printed search results, and the judgment in the action, except to the extent that it relates to the finding of the fact of reliance by each person and provides for subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the registrar in respect of an error or omission in the operation of the registry.

(4) An action for recovery of damages under this section brought by a trustee under a trust indenture or any person with an interest in a trust indenture shall be brought as an action on behalf of all persons with interests in the same trust indenture, and the judgment in the action, except to the extent that it provides for subsequent determination of the amount of damages suffered by each such person, constitutes a judgment between each such person and the registrar in respect of the error or omission.

(5) In an action brought by a trustee under a trust indenture or by any person with an interest in a trust indenture, proof that each person relied on the prescribed registry document or printed search results is not necessary if it is established that the trustee relied on the prescribed registry document or printed search results, but no person is entitled to recover damages under this section if he knew at the time he acquired his interest that the prescribed registry document or printed search results relied on by the trustee were incorrect.

(6) The total of all claims for compensation paid under subsections (3) and (4) in any single action shall not exceed the prescribed amount.

(7) In proceedings under subsections (3) and (4) the court may make any order that it considers appropriate to give notice to members of the class.

(8) Subject to subsection (6), the court may order payment of all or a portion of the damages awarded to identified members of the class at any time after judgment, and the obligation of the registrar to satisfy the judgment is satisfied to the extent that payment is made.

(9) The Minister of Finance may, without action brought, pay the amount of a claim against the registrar when authorized to do so by the Minister of Justice on the report of the registrar setting forth the facts and the certificate of the registrar that in his opinion the claim is just and reasonable.

(10) When an award of damages has been made in favour of the claimant and the time for appeal has expired or, when an appeal is taken, it is disposed of in favour of the plaintiff, the Minister of Finance shall authorize payment out of the consolidated fund in the manner and in the amount specified in the judgment, including any costs awarded to the claimant.

(11) Where damages are paid to a claimant under this section, the registrar is subrogated to the rights of the claimant to the amount so paid against any person indebted to the claimant and whose debt to the claimant was the basis of the loss or damage in respect of which the claimant was paid, and the registrar many enforce those rights by action in court or otherwise in the name of the Crown in right of Saskatchewan.

(12) Notwithstanding *The Proceedings Against the Crown Act*, no action shall be brought against the Crown in right of Saskatchewan, the registrar or any officer or employee of the

registry for any act or omission of the registrar or an officer or employee of the registry in respect of the discharge or purported discharge of any duty or function under this or any other Act or under the regulations, other than as provided in this section. 1983, c.11, s.61.

* * *

(proposed Act)

52(1) A person may bring action against the registrar to recover loss or damage suffered by that person because of an error or omission in the operation of the registry where the loss or damage resulted

(a) from reliance on a printed search result, or

(b) except as provided by subsections (3) and (10) of section 43, the failure of the registrar to register a printed financing statement submitted for registration as provided in section 43.

(2) No action for damage under this section or section 53 lies against the Registrar unless it is commenced not later than two years after the person entitled to bring the action first knew of the loss or damage, or

(a) in the case of an action brought under subsection (1)(a), ten years from the date the search result was issued, whichever is earlier, and

(b) in the case of an action brought under subsection (1)(b), ten years from the date that the financing statement was submitted for registration, whichever is the earlier.

(3) Notwithstanding The Proceedings Against the Crown Act, no action may be brought against the Crown in the right of the Province, the Registrar or an officer of employee of the registry for any error or omission of the Registrar of an officer or employee of the Registry in respect of the discharge or purported discharge of any duty or function under this Act, the regulations or under any other Act except as provided in this section and in section 53.

53(1) An action for recovery of damages under section 52 brought by a trustee under a trust indenture or by a person with an interest in a trust indenture shall be brought on behalf of all persons with interests in the same trust indenture, and the

judgment in the action, except to the extent that it provides for a subsequent determination of the amount of damages suffered by each person, constitutes a judgment between each person and the Registrar in respect of each error or omission.

(2) In an action brought by a trustee under a trust indenture or by a person with an interest in a trust indenture, proof that each person relied on the search result is not necessary if it is established that the trustee relied on the search result, but no person is entitled to recover damages under this section if the person knows at the time of acquisition of an interest in the collateral that the search result relied upon by the trustee is incorrect.

(3) In proceedings under this section, a court may make any order that it considers appropriate in order to give notice to the persons with interest in the same trust indenture.

(4) Subject to section 54(1), a court may order payment of all or a portion of the damages awarded to identified persons with interests in the same trust indenture at any time after judgment, and the obligation of the Registrar to satisfy the judgment is satisfied to the extent that payment is so made.

54(1) The total amount recoverable in a single action under section 52, and the total amount recoverable for all claims in a single action under section 53 shall not exceed the amount prescribed.

(2) Where damages are paid to a claimant pursuant to section 52 or 53, the Crown is subrogated to the rights of the claimant against any person indebted to the claimant whose debt to the claimant was the basis of the loss or damage in respect of which the claim was paid.

(3) Where the claimant recovers pursuant to section 52 or 53 an amount less than the value of the interest the claimant would have had if the error or omission had not occurred, the right of subrogation under subsection (2) does not prejudice the right of the claimant to recover in priority to the Crown an amount equal to the difference between the amount paid to the claimant and the value of the interest the claimant would have had if the error or omission had not occurred.

(4) The Provincial Treasurer may, without action being brought, pay the amount of a claim against the Registrar when authorized to do so by the Minister responsible for this Act on the report of the Registrar setting forth the facts and the opinion of the Registrar that the claim is just and reasonable.

(5) When an award of damages has been made in favour of a claimant and the time for appeal has expired, or when an appeal is taken and it is disposed of in whole or in part in favour of the claimant, the Provincial Treasurer shall authorize payment out of the Consolidated Revenue of the Province, subject to subsection (1), the amount specified in the judgment in a manner specified in the judgment, including the costs of the claimant if the judgment so provides.

COMMENT

There are a few important differences between section 53 of the existing Act and sections 52 of the proposed Act.

Under section 53 of the existing Act, recovery against the registrar is limited to persons who have suffered loss or damage as a result of reliance on a registry document or printed search result. In other words, the assumption of the section is that if an error has been made in the registry process, the financing statement that was tendered is deemed to have been registered in the form in which it was tendered, even though the information on that financing statement is different from that actually entered into the data base of the system. This being the case, the person who tenders the financing statement cannot suffer loss since his security interest is perfected by registration. The person who suffers the loss is the person who relies on the incorrect information disclosed in the search result.

While section 52(1) of the proposed Act maintains this approach, it provides for a situation not addressed in section 53 of the existing Act in which the person tendering the financing statement may suffer loss. This is where a printed financing statement (but not a financing statement in the form of registration data) is tendered, but is not registered at all. In order for a financing statement to be registered, it must be assigned a date and number by the registrar. In such a case, the person may suffer loss but cannot recover under the existing Act. Section 52(1) corrects this deficiency by allowing recovery in such a situation. Recovery is not permitted where remote registration is effected since there is no way a registrar can defend an action by a registrating party by establishing what was actually received by the registry.

Another important difference between section 53 of the existing Act and section 52 of the proposed Act is to be found in the limitation of actions provisions. Under section 53(2) of the existing Act, the period of limitation runs from the date that the damage is suffered. The difficulty with this approach is that either the date at which the damage is suffered is difficult to determine or the damage can be suffered without the person being aware of the fact. For example, assume that an error is made in entering data in the data base of the registry. A searching party obtains a search result and enters into a transaction with the debtor on the

strength of information disclosed in a search result. As noted above, the effect of the existing Act is that the registration is deemed to contain the information contained on the financing statement and not the information disclosed on the search result. The very difficult question arises as to whether the searching party suffered loss at the date he entered into the transaction with the debtor or several years later when the debtor becomes insolvent and the registering party asserts priority on the basis of the deemed registration. If it is the former, the limitation period may well have expired by the time the searching party becomes aware that he has suffered the loss.

Section 52(2) of the proposed Act eliminates this difficulty by providing that the limitation period begins to run from the date that the person entitled to bring the action first knew of the loss or damage. However, the section specifies a maximum period of ten years. This is necessary in order to permit the registry to avoid having to store records for long periods of time. Under the section, the registrar will be required to keep for ten years records of registrations and searches necessary to defend an action. However, after that point these records can be destroyed since no action can be brought thereafter.

PART V

RIGHTS AND REMEDIES ON DEFAULT

(existing Act)

55(1) Unless otherwise provided in this Part, this Part applies only to a security interest that secures payment or performance of an obligation.

(2) Notwithstanding subsection (1), this Part does not apply to a transaction between a pledgor and a pawnbroker.

(3) The rights and remedies mentioned in this Part are cumulative.

(4) Subject to any other Act or rule of law to the contrary, where a security agreement covers both real and personal property, the secured party may proceed under this Part as to the personal property or he may proceed as to both real and personal property, in which case this Part is not inconsistent with laws applicable to proceedings against real and personal property in a single action.

(5) A security interest does not merge merely because a secured party has reduced his claim to judgment.

* * *

(proposed Act)

55(1) This Part does not apply to

(a) a transaction referred to in section 3(2),

(b) a transaction between a pledgor and a pawnbroker.

(2) The rights and remedies referred to in this Part are cumulative.

(3) In this section "secured party" includes a receiver.

(4) Subject to any other Act or rule of law to the contrary, where the same obligation is secured by an interest in land and a security interest to which this Act applies, the secured party may

(a) proceed under this Part as to the personal property, or

(b) proceed as to both the land and the personal property in which case

(i) the secured party's rights, remedies and duties in respect of the land apply to the personal property with necessary modifications as if the personal property were land, and

(ii) this Part does not apply.

(5) Subsection (4)(b) does not limit the rights of a secured party who has a security interest in the personal property taken before or after the security interest mentioned in subsection (4), and the secured party

(a) has standing in proceedings taken in accordance with subsection (4)(b) and,

(b) may apply to the court for the conduct of a judicially supervised sale under subsection (4)(b) and the court may grant the application.

(6) for the purpose of distributing the amount received from the sale of the land and personal property where the purchase price is not allocated to the land and the personal property separately, the amount of the total price that is attributable to the sale of the personal property is that proportion of the total price that the market value of the personal property at the time of sale bears to the market value of the land and the personal property at the time of the sale.

(7) A security interest does not merge merely because a secured party has reduced the claim to judgment.

COMMENT

Sections 55(1) of the proposed Act has the same function as sections 55(1) and (2) of the current Act. It excludes from the scope of Part V the deemed security interests and transactions between pledgor and pawnbrokers. However, a different approach is employed: section 55(1) of the proposed Act is much more explicit than section 55(1) of the current Act.

Section 55(3) of the proposed Act represents a more direct approach than that taken in the drafting of the existing Act to the designation of those provisions of Part V that apply to receivers. Throughout Part V, each section that applies to receivers is specifically identified.

Sections 55(4) and (5) of the proposed Act address the same matter that is addressed in section 55(4) of the existing Act. However, the new sections have be formulated to provide greater clarity and to deal with issues not specifically mentioned in section 55(4) of the existing Act.

Unlike its counterpart in the existing Act, section 55(4) of the proposed Act makes it quite clear that a secured party who has a security interest in both land and personal property taken to secure the same obligation may proceed against his collateral as though the personal property were real property. When he or she decides to do so, the real property law applicable to the enforcement of the security interest in the real property applies with necessary modifications to the enforcement of the personal property. Consequently, in an appropriate case, those provisions of The Limitation of Civil Rights Act, The Land Contracts Actions Act and The Land Titles Act relating to the cancellation of agreements for sale and foreclosure of mortgages would apply to the personal property collateral to the same extent as they apply to the real property collateral. It is important to note, however, that this provision cannot be relied upon as method of circumventing the substantive limitations and procedural requirements of The Limitation of Civil Rights Act, The Saskatchewan Farm Security Act, The Distress Act and The Exemptions Act applicable to security interests in goods. This is made clear by the opening words of section 55(4), which subordinate this provision to "any other Act or law to the contrary" and by section 69(1).

There is no counterpart in the existing Act to section 55(5) of the proposed Act. When section 55(4) is applied in the context of a situation where there are other security interests in the personal property, issues not encountered in the purely inter partes relationship between the secured party and the debtor may arise. The purpose of section 55(5) is to address the most important of these issues.

Section 55(5) of the proposed Act focuses particularly on the rights of other secured parties with security interests in the personal property taken before or after that of the secured party who elects to proceed under section 55(4). A secured party with a prior security interest cannot be affected by the section 55(4) proceedings. Any disposition of the personal property, whether by sale under a judicial sale or by transfer to the secured party under a foreclosure order, is subject to any prior perfected security interest in the personal property.

The problem is somewhat more complex in a situation where the rights of the holder of a subsequent security interest are involved. This is so, since the election by the holder of a prior security interest to proceed under section 55(4) could have significant adverse consequences for the any subsequent security interest. Section 55(5) of the proposed Act provides that such an election "does not limit the rights" of the holder of a subsequent security interest. Accordingly, any rights that such holder has under The Personal Property Security Act, common law or equity are specifically preserved. For example, the holder of a subsequent security interest must be given the pre-disposition notices required by section 59 unless a court orders otherwise. In an appropriate case, the holder would also be

entitled to seek the intervention of the court to require the secured party to marshall his security. In addition to these rights, the holder of a subsequent security interest has standing in any proceedings taken to enforce the security interest against the real property and personal property and has a right to apply for a judicially supervised sale of the real and personal property.

No doubt there will be situations where the assertion of rights given by the Act to the holder of a subsequent security interest will come into conflict with procedural rights that the prior secured party is given by the law applicable to the enforcement of security interests against land. When this occurs, a court can exercise the broad jurisdiction that it has under section 63 to ensure that such a conflict is avoided or that its effects are minimized.

Endemic to the type of situation contemplated by section 55(4) is the problem of allocation of the proceeds of the sale of the land and the personalty. Where a single debt is secured by a security interest in personalty and in land and the cumulative value of the personalty and the land exceeds the amount of the debt, it becomes very important to the holders of subsequent security interests in the personal property or the real property to have the proceeds of the disposition of the collateral allocated in such a way as to avoid jeopardy to their position as secured creditors of the debtor. If the prior secured party is free to allocate the proceeds of the disposition of the collateral as he or she sees fit or as the debtor instructs, unfairness may result. The effect of section 55(6) is to require that the proceeds be allocated to the debt in proportion to the market value of each type of collateral. The operation of the section is displayed in the following scenario:

> Assume that the debt owing to SP1 is $10,000, and the sum of $12,000 is realized from a judicial sale of the land and personal property. Assume that SP2 has a subordinate security interest in the personal property only and, consequently, has an interest in seeing that the $12,000 is allocated so as to reflect his security interest in the personal property.

The effect of section 55(5)(b) is that the market value of the land and the market value of the personalty are separately determined.

> Assume that the land has a market value of $8,000 and the personal property has a market value of $4,000. Accordingly, 8/12ths of the proceeds ($6666.66) were deemed recovered from the sale of the land and 4/12ths of the proceeds ($3333.33) were deemed recovered from the sale of the personal property. Consequently, the sum of $666.66 is available to SP2 under section 61.

(existing Act)

56(5) Where the debtor is in default under a security agreement, the secured party has, in addition to any other rights and remedies, the rights and remedies provided in the security agreement except as limited by subsection (8), the rights and remedies provided in this Part and, when in possession, the rights, remedies and duties provided in section 17.

(7) Where the debtor is in default under a security agreement, he has, in addition to the rights and remedies provided in the security agreement and any other rights and remedies, the rights and remedies provided in this Part and in section 17.

(8) Except as provided in sections 17, 61 and 62, no provision of section 17 or sections 59 to 63, to the extent that they give rights to the debtor and impose duties upon the secured party, shall be waived or varied.

* * *

(proposed Act)

56(1) In this section "secured party" includes a receiver.

(2) Where the debtor is in default under a security agreement

(a) except as provided by subsection (3), the secured party has against the debtor only

(i) the rights and remedies provided in the security agreement,

(ii) the rights, remedies and obligations provided in this Part and sections 36, 37 and 38, and

(iii) when in possession of the collateral, the rights remedies and obligations provided in section 17,

(b) the debtor has as against the secured party

(i) the rights and remedies provided in the security agreement,

(ii) the rights and remedies provided by any other Act or rule of law not inconsistent with this Act, and

(iii) the rights and remedies provided in this Part and in section 17.

(3) Except as provided in sections 17, 59, 60 and 62, no provision of sections 17 or 58 to 63, to the extent that it gives rights to the debtor or imposes obligations on the secured party, can be waived or varied by agreement or otherwise.

COMMENT

For the most part, section 56 of the proposed Act involves little more than a restructuring of sections 56(5), 56(7) and 56(8) of the existing Act. There is, however, one significant change. It will be noted that section 56(2)(a) of the proposed Act limits the remedies available to the secured party to those remedies provided in the security agreement and those remedies provided in the Act. Common law and equitable remedies are excluded. The effect of the provision is to preclude a Saskatchewan court from concluding, as did the Ontario High Court in Tureck v. Hanston Investments Ltd. (1985-86) 5 P.P.S.A. C. 21, that common law and equitable concepts, such as the distinction between a pledge and an equitable mortgage, have survived the enactment of The Personal Property Security Act. Part V of the Act is a pre-emptive code of rules dealing with the enforcement of security interests. The public policies that underlie the Act, if not the symmetry of the Act, may well be distorted if common law and equitable rules were seen by the courts as being superimposed on the statutory structure of Part V.

(existing Act)

57(1) Where so agreed and in any event upon default under a security agreement, a secured party is entitled:

(a) to notify any debtor on an intangible or chattel paper or any obligor on an instrument to make payment to him whether or not the assignor was theretofore making collections on the collateral; and

(b) to take control of any proceeds to which he is entitled under section 28.

(2) A secured party who by agreement is entitled to charge back the collected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the debtors on intangibles or chattel paper or obligors on instruments may deduct his reasonable expenses of realization from the collections.

* * *

(proposed Act)

57(1) In this section "secured party" includes a receiver.

(2) Where the parties to a security agreement agree, a secured party is entitled

(a) to notify a debtor on an intangible or chattel paper or an obligor on an instrument to make payment to the secured party whether or not the assignor was making collections on the collateral before the notification,

(b) to take control of any proceeds to which the secured party is entitled under section 28, and

(c) to apply any money taken as collateral to the satisfaction of the obligation secured by the security interest.

(3) A secured party may deduct reasonable expenses of collection

(a) from amounts collected from a debtor on an intangible or chattel paper or an obligor under an instrument, or

(b) from money held as collateral.

COMMENT

There is only one significant difference between section 57 of the proposed Act and section 57 of the existing Act. It will be noted that section 57(2) of the existing Act makes reference to situations where the secured party is entitled to charge back the collected collateral against the debtor or undertakes to collect from debtors. No such reference is found in section 57(3) of the proposed Act. The reason why the reference has been dropped is because it is inappropriate for inclusion in Part V of the Act. In all situations where the relationship between the parties is that of secured party and debtor the secured party has a right of recourse against the debtor. Where the relationship between the parties is not that of secured party and debtor, it is inappropriate to address the matter of cost recovering in a part of the Act that expressly applies only to security agreements. (See section 55(1) of the proposed Act.)

(existing Act)

56(6) The secured party may enforce the security interest by any method available in or permitted by law and, if the collateral is or includes documents of title, the secured party may proceed either as to the documents of title or as to the goods covered thereby, and any method of enforcement that is available with respect to the documents of title is available, *mutatis mutandis*, with respect to the goods covered thereby.

58 Subject to sections 36 and 37, upon default under a security agreement:

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral by any method permitted by law;

(b) the secured party may, if the collateral is equipment and the security interest has been perfected by registration, render that equipment unusable without removal thereof from the debtor's premises, and the secured party is thereupon deemed to have taken possession of the equipment; and

(c) the secured party may dispose of collateral under section 59 on the debtor's premises.

* * *

(proposed Act)

58(1) In this section "secured party" includes a receiver.

(2) Subject to sections 36, 37 and 38, on default under a security agreement

(a) the secured party has, unless otherwise agreed, the right to take possession of the collateral or otherwise enforce the security agreement by any method permitted by law,

(b) where the collateral is goods of a kind that cannot be readily moved from the debtor's premises or of a kind for which adequate storage facilities are not readily available, the secured party may seize or repossess the collateral without removing it from the debtor's premises in any manner by which a sheriff may seize without removal, if the secured party's interest is perfected by registration,

(c) where clause (b) applies, the secured party may dispose of collateral on the debtor's premises but shall not cause the person in possession of the premises any greater inconvenience and cost than is necessarily incidental to the disposal,

(d) if the collateral is a document of title, the secured party may proceed either as to the document of title or as to the goods covered by it, and a method of enforcement that is available with respect to the document of title is also available, with all necessary modifications, with respect to the goods covered by it.

COMMENT

Section 58(1)(b) and (c) of the proposed Act goes much further than section 58(b) of the existing Act in facilitating the enforcement of security interests against collateral that is difficult to move from the debtor's premises. Section 58(b) of the existing Act applies only to the seizure of "equipment". Section 58(2)(b) and (c) reflect the Commission's conclusion that there is no good reason to exclude from the operation of the section collateral in the form of "inventory" or "consumer goods". Section 58(2) of the proposed Act permits the secured party to make a constructive seizure or repossession of the collateral in any manner by which a sheriff may seize goods without removing them from the debtor's possession. Under section 4 of The Executions Act, a sheriff can seize and leave goods in the possession of the debtor under a bond from the execution debtor. At common law, a sheriff can seize goods without removal of them so long as there is overt evidence of the sheriff's intention to effect and maintain the seizure. (See, e.g. Dodd v. Vail (1913) 4 W.W.R. 291 (Sask. S.C.) and Lloyds and Scottish Finance, Ltd. v. Modern Car and Caravans Ltd. [1964] 2 All E.R. 733 (Q.B.D.).) Section 58(2)(c) permits disposal of the goods on the debtor's premises, but at the same time, provides a measure of protection to the debtor or to anyone else in possession of the premises.

(existing Act)

59(1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to:

(a) the reasonable expenses of retaking, holding, repairing, processing or preparing for the disposition and disposing

of the collateral and any other reasonable expenses incurred by the secured party; and

(b) the satisfaction of the obligations secured by the security interest of the party making the disposition.

(2) Collateral may be disposed of:

(a) by public or private sale;

(b) at any commercially reasonable time of day or place;

(c) as a whole or in commercial units or parts;

(d) if the security agreement so provides, by lease or by deferred payment.

(3) The secured party may delay disposition of the collateral in whole or in part for any period of time that is commercially reasonable.

(4) Not less than 20 days prior to disposition of the collateral, the secured party shall serve a notice on:

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral;

(b) any creditor or person with a security interest in the collateral:

(i) whose interest is subordinate to that of the secured party; and

(ii) who has registered a financing statement in the name of the debtor or according to the serial number of the collateral when it is required for registration; and

(c) any other person with an interest in the collateral who has delivered a written notice to the secured party of his interest in the collateral prior to the date that the notice is served on the debtor.

(5) A receiver or receiver-manager appointed by a court or pursuant to a security agreement shall serve notice of his intention to dispose of the collateral on:

(a) the debtor, unless the debtor is a corporation, the directors of which have ceased to have power to act because of the appointment of a receiver-manager;

(b) any other person who is known by the secured party to be the owner of the collateral;

(c) any person mentioned in clause (4)(b); and

(d) any other person with an interest in the collateral who has delivered a written notice to the secured party of his interest in the collateral prior to its disposition.

(6) The notice mentioned in subsection (4) shall contain:

(a) a description of the collateral sufficient to enable it to be identified;

(b) the amount required to satisfy the obligations secured by the security interest;

(c) the sums actually in arrears, exclusive of the operation of any acceleration clause in the security agreement, and a brief description of any other provision of the security agreement for the breach of which the secured party intends to dispose of the collateral;

(d) the amount of the applicable expenses mentioned in clause (1)(a) or, where the amount of such expenses has not been determined, a reasonable estimate;

(e) a statement that upon payment of the amounts due under clauses (b) and (d), any person entitled to receive the notice may redeem the collateral;

(f) a statement that, upon payment of the sums actually in arrears or the curing of any other default, as the case may be, together with amounts due under clause (1)(a), the debtor may reinstate the security agreement;

(g) a statement that, unless the collateral is redeemed or the security agreement is reinstated, the collateral will be disposed of and the debtor may be liable for any deficiency; and

(h) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

(7) The notice mentioned in subsection (5) shall contain:

(a) a description of the collateral by type or kind; and

(b) the date, time and place of any public sale or the date after which private disposition of the collateral is to be made.

(8) Where the notice required in subsection (4) is served on any person other than the debtor, it need not contain the information specified in clauses (6)(c), (f) and (g), and, where the debtor is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in clauses (6)(c) and (f).

(9) No statement mentioned in clause (6)(g) shall make reference to any liability on the part of the debtor to pay a deficiency if under any Act or rule of law the secured party does not have the right to collect a deficiency from the debtor.

(10) The notice required in subsection (4) or (5) may be served in accordance with subsection 67(1) or, in the case of service on the person who has registered a financing statement, by registered mail addressed to the post office address of the person to be served as it appears on the security agreement or financing statement.

(11) The secured party may purchase the collateral or any part thereof only at a public sale and only for a price that bears a reasonable relationship to market value.

(12) When a secured party disposes of collateral by sale to a *bona fide* purchaser for value who takes possession of it, the purchaser acquires the collateral free from the interests of the debtor and from any interest subordinate to that of the secured party, whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by such subordinate interests are deemed to be performed for the purposes of section 50.

(13) Subsection (12) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 72 who has not been given a written notice under this section.

(14) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or

is subrogated to his rights has thereafter the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral.

(15) The notice mentioned in subsection (4) is not required where:

(a) the collateral is perishable;

(b) the collateral will decline substantially in value if not disposed of immediately after default;

(c) the cost of care and storage of the collateral is disproportionately large relative to its value;

(d) due to market conditions, a delay in disposing of the collateral would likely reduce the amount recovered from a disposition of it;

(e) for any other reason, a judge, or an *ex parte* application, is satisfied that a notice is not required;

(f) after default, every person entitled to receive a notice of disposition under subsection (4) consents in writing to the immediate disposition of the collateral.

* * *

(proposed Act)

59(1) In subsections (2), (5), (14) and (17), "secured party" includes a receiver.

(2) After seizing or repossessing the collateral, a secured party may dispose of it in its existing condition or after repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to

(a) the reasonable expenses of seizing, repossessing, holding, repairing, processing or preparing for disposition and disposing of the collateral and any other reasonable expenses incurred by the secured party, and

(b) the satisfaction of the obligations secured by the security interest of the party making the disposition,

and any surplus shall be dealt with in accordance with section 60.

(3) Collateral may be disposed of

(a) by private sale,

(b) by public sale, including public auction or closed tender,

(c) as a whole or in commercial units or parts,

(d) if the security agreement so provides, by lease.

(4) Where the security agreement so provides, the payment for the collateral being disposed of may be deferred.

(5) The secured party may delay disposition of the collateral in whole or in part.

(6) Not less than 20 days prior to disposition of the collateral, the secured party shall give a notice to

(a) the debtor or any other person who is known by the secured party to be an owner of the collateral,

(b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party

(i) who has registered a financing statement according to the name of the debtor or according to the serial number of the collateral if the goods are defined in the regulations as serial numbered goods, when it is required or permitted for registration, or

(ii) whose security interest is perfected by possession at the time the secured party seized or repossessed the collateral, and

(c) any other person with an interest in the collateral who has given a written notice to the secured party of that person's interest in the collateral prior to the date that the notice of disposition is given to the debtor.

(7) The notice referred to in subsection (6) shall contain

(a) a description of the collateral,

(b) the amount required to satisfy the obligation secured by the security interest,

(c) the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement, and a brief description of any other default and the provision of the security agreement the breach of which resulted in the default,

(d) the amount of the applicable expenses referred to in subsection (2)(a) or, where the amount of the expenses has not been determined, a reasonable estimate,

(e) a statement that upon payment of the amount due under clauses (b) and (d), any person entitled to receive the notice may redeem the collateral,

(f) a statement that, on payment of the sums in arrears exclusive of the operation of any acceleration clause in the security agreement, or the curing of any other default, as the case may be, together with the amount due under subsection (2)(a), the debtor may reinstate the security agreement,

(g) a statement that unless the collateral is redeemed or the security agreement is reinstated, it will be disposed of and the debtor may be liable for a deficiency, and

(h) the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted, or the date after which any private disposition of the collateral is to be made.

(8) Where the notice required in subsection (6) is given to a person other than the debtor, it need not contain the information specified in subsections (7)(c), (f) and (g), and where the debtor is not entitled to reinstate the security agreement, the notice to the debtor need not contain the information specified in subsections (7)(c) and (f).

(9) A statement referred to in subsection (7)(g) shall not contain a reference to any liability on the part of the debtor to pay a deficiency if under any Act or rule of law the secured party does not have the right to collect the deficiency from the debtor.

(10) Not less than 20 days prior to the disposition of the collateral, a receiver shall give a notice to

(a) the debtor, and where the debtor is a corporation, a director of the corporation,

(b) any other person who is known by the secured party to be an owner of the collateral,

(c) a person referred to in subsection (6)(b), and

(d) any other person with an interest in the collateral who has given a notice in writing to the receiver of that interest before the day notice of disposition is given to the debtor.

(11) The notice referred to in subsection (10) shall contain

(a) a description of the collateral,

(b) a statement that unless the collateral is redeemed it will be disposed of, and

(c) the date, time and place of any sale by public auction, or the place to which closed tenders may be delivered and the date after which closed tenders will not be accepted, or the date after which any private disposition of the collateral is to be made.

(12) The notice required in subsection (6) or (10) may be given in accordance with section 68 or where it is to be given to a person who has registered a financing statement, by registered mail addressed to the person to whom it is to be given as it appears on the financing statement.

(13) The secured party may purchase the collateral or any part of it only at a public sale as referred to in subsection (3)(b), and only for a price that bears a reasonable relationship to the market value of the collateral.

(14) When a secured party disposes of collateral to a purchaser who acquires the interest for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) an interest subordinate to that of the debtor,

(c) an interest subordinate to that of the secured party,

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured

by the subordinate interests are deemed to be performed for the purposes of sections 49 and 50.

(15) Subsection (14) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 72 who has not been given a notice under this section.

(16) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or who is subrogated to the rights of the secured party has thereafter the rights and duties of the secured party, and the transfer of collateral is not a disposition of the collateral.

(17) The notice referred to in subsection (4) or (8) is not required where

(a) the collateral is perishable,

(b) the secured party believes on reasonable grounds that the collateral will decline substantially in value if it is not disposed of immediately after default,

(c) the cost of care and storage of the collateral is disproportionately large relative to its value,

(d) the collateral is a security or instrument that is to be disposed of by sale on an organized market that handles large volumes of transactions between many different sellers and many different buyers,

(e) the collateral is money, other than a medium of exchange authorized by the Parliament of Canada, or

(f) for any other reason, a court on ex parte application is satisfied that a notice is not required,

(g) after default, each person entitled to receive a notice of disposition consents in writing to the disposition of the collateral without compliance with the notice requirements of subsection (6) or (10).

(18) The notice referred to in subsection (6) or (10) need not be delivered to

(a) a debtor where the security agreement is one to which sections 19-35 of The Limitation of Civil Rights Act,

(b) a farmer where the security agreement is one to which sections 47-61 of The Saskatchewan Farm Security Act apply.

COMMENT

The differences between section 59 of the existing Act and section 59 of the proposed Act, for the most part, result from the need to reorganize, clarify or amplify features of existing section 59. There are, however, a few exceptions to this generalization.

There are significant differences between section 59(10) and (11) of the proposed Act and section 59(5) and (7) of the existing Act. The proposed section 59(10) and (11) contains requirements not found in section 59(5) and (7) of the existing Act: the notice must be served not less that 20 days before disposition of the collateral; it must be served on, inter alia, a director or a debtor corporation; and it must make reference to the right of redemption. The notice of the right of redemption relates to section 62(1)(a) of the proposed Act which, unlike section 62(1)(a) of the existing Act, gives to a debtor in cases of the appointment of a receiver, a right to redeem the collateral.

It will be noted that, under section 59(17) of the proposed Act, a secured party may proceed without notice to dispose of collateral in the form of a security or an instrument where the collateral is to be sold on an organized market in which large numbers of transactions take place. This new exception to the notice requirement is designed to accommodate disposition of fungible collateral in the form of securities or instruments of exchanges. The requirement that a notice be given is designed to permit the debtor or someone else with an interest in the collateral to redeem it and to give the debtor or someone with an interest in the collateral the opportunity to take measures to ensure that when the collateral is sold the sale is carried out in such a way as to recognize that person's interest in the collateral. However, where publicly-traded shares or debt instruments are involved, there is little need to provide these measures. Since the collateral is fungible, the debtor or a third person can acquire replacement collateral in the market after the disposition. Further, since, by definition, a disposition of the collateral in the market must be for the market price of the collateral, there is no need to give to the debtor or other person with an interest in the collateral an opportunity to take measures to ensure that the disposition is carried out in such a way as to realize the full market value of the collateral.

It will be noted that the proposed section 59(18) exempts a secured party from the requirement to deliver a notice as prescribed by sections 59(8) or 59(10) to a debtor where the security agreement is one to which sections 17-35 of The Limitation of Civil Rights Act apply or to a farmer where the security agreement is one to which sections 47-61 of The Saskatchewan Farm Security Act apply. The basis for this exclusion is that these Acts set out elaborate pre-seizure and post-

seizure procedural requirements designed to give to the debtor every reasonable opportunity to protect his interest in the collateral. There is no need to load on top of these requirements an additional set of notice requirements. It will be noted, however, that the subsection does not exempt the secured party from delivering the requisite notice to other persons mentioned in section 59(6) or 59(10). Since these persons do not get the protection of The Limitation of Civil Rights Act or The Saskatchewan Farm Security Act, it is important that their rights to protect their interest in the collateral are preserved.

(existing Act)

60(1) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57 or has disposed of it in accordance with section 59 or otherwise, he shall account for and pay over any surplus consecutively to:

(a) any person who has a subordinate security interest in the collateral who registers a financing statement indexed in the name of the debtor or according to the serial number of the collateral, when it is required for registration, prior to the distribution of the proceeds;

(b) any other person who has an interest in the surplus, if that person has delivered a written demand therefore on the secured party prior to distribution of the proceeds; and

(c) the debtor.

(2) The secured party may request a person who has a subordinate security interest or a person who has delivered a written demand to furnish him with proof of that person's interest, and, unless the person furnishes such proof within 10 days after the secured party's demand, the secured party need not pay over any portion of the surplus to him.

(3) Unless other wise agreed, or unless otherwise provided in any Act, the debtor is liable for any deficiency.

* * *

(proposed Act)

60(1) In this section "secured party" includes a receiver.

(2) Where a security agreement secures an indebtedness and the secured party has dealt with the collateral under section 57, or has disposed of it in accordance with section 59 or otherwise, any surplus shall, unless otherwise provided by law or by the agreement of all interested parties, be accounted for and paid in the following order to

(a) a person who has a subordinate security interest in the collateral

(i) who registers a financing statement using the name of the debtor or according to the serial number of the collateral if the goods are defined in the regulation as serial numbered goods before the distribution of the proceeds, or

(ii) whose interest was perfected by possession at the time the collateral was seized,

(b) any other person with an interest in the surplus, if that person has given a written notice thereof to the secured party prior to the distribution, and

(c) the debtor of any other person who is known by the secured party to be an owner of the collateral,

but the priority of claim of any person referred to in clauses (a), (b) or (c) is not prejudiced by payment to anyone pursuant to this section.

(3) The secured party shall give a written accounting of

(a) the amount received from the disposition of collateral or the amount collected under section 57,

(b) the manner in which the collateral was disposed of,

(c) the amount of expenses as provided in section 17,57 and 59,

(d) the distribution of the amount received from the disposition or collection, and

(e) the amount of any surplus,

to a person referred to in subsection (2) within 30 days after receipt of a written request for an accounting.

(4) Where there is a question as to who is entitled to receive payment under subsection (2), the secured party may pay the surplus into court and the surplus shall not be paid out except upon an application under section 68 by a person claiming an entitlement to it.

(5) Unless otherwise agreed, or unless otherwise provided in this or any other Act, the debtor is liable to pay to the secured party the deficiency.

COMMENT

Section 60(2) of the proposed Act parallels section 60(1) of the existing Act with one important addition. The proposed new provision makes clear what was implicit in the section it has been designed to replace: that the distribution scheme of the section should not be read as a priority rule.

There is no equivalent in the existing Act to section 60(3) of the proposed Act. This section gives to a person who has an interest in the collateral, and, therefore, in any surplus, a right to demand and receive from the secured party a written accounting of the disposition of the collateral and the amount received from the disposition of the collateral.

There is no equivalent in the existing Act to section 60(4) of the proposed Act. The proposed section would provide a simplified interpleader mechanism for a secured party who is left in doubt as to how to disburse a surplus.

(existing Act)

61(1) After default, the secured party in possession of the collateral may propose to retain the collateral in satisfaction of the obligations secured, and shall serve a notice of the proposal on:

(a) the debtor or any other person who is known by the secured party to be the owner of the collateral;

(b) any creditor or person who has a security interest in the collateral;

(i) whose interest s subordinate to that of the secured party; and

(ii) who has registered a financing statement in the name of the debtor or according to the serial

number of the collateral when it is required for registration; and

(c) any other person with an interest in the collateral who has delivered a written notice to the secured party of an interest in the collateral prior to the date that notice is served on the debtor.

(2) If any person who is entitled to notification under subsection (1), and whose interest in the collateral would be adversely affected by the secured creditor's proposal, delivers to the secured party a written objection within 15 days after service of the notice, the secured party shall dispose of the collateral under section 59.

(3) If no objection is made, the secured party in possession is, at the expiration of the 15-day period or periods mentioned in subsection (2), deemed to have irrevocably elected to retain the collateral in full satisfaction of the obligations secured, and thereafter is entitled to hold or dispose of the collateral free from all rights and interests therein of any person entitled to notification under clause (1)(b) who has been served with such notice and any person entitled to notification under clauses (1)(a) and (c) whose interest is subordinate to that of the secured party and who has been served with such notice.

(4) The notice required under subsection (1) may be served in accordance with subsection 67(1) or, in the case of service on a person who has registered a financing statement, by registered mail addressed to the post office address of the person to be served as it appears on the security agreement or financing statement.

(5) The secured party may require any person who has made an objection of his proposal to furnish him with proof of that person's interest in the collateral and, unless the person furnishes proof within 10 days of the secured party's demand, the secured party may proceed as if he had received no objection from such person.

(6) Upon application by a secured party, and after notice to all persons affected, a judge may determine that an objection to the proposal of a secured party is ineffective in the ground that:

(a) the person made the objection for a purpose other than the protection of his interest in the collateral or the proceeds of a disposition of the collateral; or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) When a secured party in possession disposes of the collateral after expiration of the period mentioned in subsection (3) to a *bona fide* purchaser for value who takes possession of it, the purchaser acquires the collateral free from any interest subordinate to that of the secured party, whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by such subordinate interests are deemed to be performed for the purposes of section 50.

(8) Subsection (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 72 who has not been given a written notice under this section.

* * *

(proposed Act)

61(1) After default, the secured party may propose to take the collateral in satisfaction of the obligation secured by it, and shall give notice of the proposal to

(a) the debtor or any other person who is known by the secured party to be an owner of the collateral,

(b) a creditor or person with a security interest in the collateral whose interest is subordinate to that of the secured party

(i) who has registered a financing statement using the name of the debtor or according to serial number the collateral when it is required [or permitted] for registration, and

(ii) whose security interest is perfected by possession of the time of secured party seized or repossessed the collateral, and

(c) any other person with an interest in the collateral who has given a written notice to the secured party of that interest prior to the date that the notice is given to the debtor.

(2) If any person is entitled to a notice under subsection (1) and whose interest in the collateral would be adversely affected by the secured party's proposal, gives to the secured party a notice of objection within 15 days after the notice under subsection (1), the secured party shall dispose of the collateral under section 59.

(3) If no notice of objection is given, the secured party is, at the expiration of the 15 day period or periods referred to in subsection (2), deemed to have irrevocably elected to take the collateral in satisfaction of the obligation secured by it, and is entitled to hold or dispose of the collateral free from all rights and interests of the debtor and any person entitled to receive notice under

(a) subsection (1)(b) or

(b) subsection (1)(c)

who has been given such notice, and all obligations secured by such interests are deemed performed for the purposes of sections 49 and 50.

(4) The notice required under subsection (1) may be given in accordance with section 68 or if it is to be given to a person who has registered a financing statement by registered mail addressed to the post office address of the person to whom it is to be given as it appears on the financing statement.

(5) The secured party may request that any person referred to in subsection (1), other than the debtor, furnish proof of that person's interest and, unless the person furnishes proof not later than 10 days after the secured party's request, the secured party may proceed as if no objection were received from the person.

(6) Upon application by a secured party, a court may determine that an objection to the proposal of a secured party is ineffective on the ground that

(a) the person made the objection for a purpose other than the protection of an interest in the collateral or proceeds of a disposition of the collateral, or

(b) the market value of the collateral is less than the total amount owing to the secured party and the costs of disposition.

(7) Where a secured party disposes of the collateral to a purchaser for value and in good faith and who takes possession of it, the purchaser acquires the collateral free from

(a) the interest of the debtor,

(b) any interest subordinate to that of the debtor,

(c) any interest subordinate to that of the secured party,

whether or not the requirements of this section have been complied with by the secured party, and all obligations secured by the subordinate interest are deemed to be performed for the purposes of section 49 and 50.

(8) Section (7) does not apply so as to affect the rights of a person with a security interest deemed to be registered under section 72 who has not received a notice under this section.

COMMENT

There are no differences of substance between section 61 of the current Act and section 61 of the proposed Act.

(existing Act)

62(1) At any time before the secured party has disposed of the collateral or contracted for such disposition under section 58 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61;

(a) any person entitled to receive a notice of disposition under subsection 59(4) may, unless he has otherwise agreed in writing after default, redeem the collateral by tendering fulfilment of all obligations secured by the collateral;

(b) the debtor may, unless he has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of any acceleration clause, or by curing any other default by reason whereof the secured party intends to dispose of the collateral;

together with a sum equal to the reasonable expenses of retaking, holding, repairing, processing and preparing for disposition and any other reasonable expenses incurred by the secured party.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement:

(a) more than twice, if the security agreement or any agreement modifying the security agreement provides for payment in full by the debtor within 12 months after the day value was given by the secured party;

(b) more than twice in each year, if the security agreement or any agreement modifying the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

* * *

(proposed Act)

62(1) At any time before the secured party or a receiver has disposed of the collateral or contracted for disposition under section 58 or 59 or before the secured party is deemed to have irrevocably elected to retain the collateral under section 61

(a) any person entitled to receive a notice of disposition under subsection 59(6) or (10) may, unless that person otherwise agrees in writing after default, redeem the collateral by tendering fulfilment of the obligations secured by the collateral,

(b) the debtor, other than a guarantor or indemnitor, may, unless the debtor has otherwise agreed in writing after default, reinstate the security agreement by paying the sums actually in arrears, exclusive of the operation of an acceleration clause in the security agreement and by curing any other default by reason of which the secured party intends to dispose of the collateral,

together with a sum equal to the reasonable expenses of seizing, repossessing, holding, repairing, processing and preparing the collateral for disposition if such expenses have actually been incurred by the secured party, and any other reasonable expenses incurred by the secured party in enforcing the security agreement.

(2) Unless otherwise agreed, the debtor is not entitled to reinstate a security agreement

(a) more than twice, if the security agreement provides for payment in full by the debtor not later than 12 months after the day value was given by the secured party,

(b) more than twice in each year, if the security agreement provides for payment by the debtor during a period of time in excess of one year after the day value was given by the secured party.

COMMENT

While in most respects section 62 of the proposed Act parallels section 62 of the existing Act, there are two important differences. The first is that the proposed provision, unlike its counterpart in the existing Act, gives a right of redemption to a debtor in a situation where a receiver has seized or taken possession of the collateral. The second is that, under the proposed section 62(1)(b), a guarantor or indemnitor is precluded from reinstating a security agreement. This right would be limited to debtors. Under the existing Act, a guarantor or indemnitor, being a "debtor" (see section 2(k)) can exercise rights under section 62(1)(b). The Commission has concluded that guarantors and indemnitors do not need this measure to protect their interests.

(existing Act)

63 Upon application by a debtor, a creditor of a debtor, a secured party, any person who has an interest in collateral which may be effected by an order under this section or receiver or a receiver-manager, whether appointed by a court or pursuant to a security agreement and after notice has been given to any person that the judge directs, a judge or court may:

(a) make any order, including binding declarations or right and injunctive relief, that is necessary to ensure compliance with this Part or section 17;

(b) give directions to any party regarding the exercise of his rights or discharge of his obligations under this Part or section 17;

(c) relieve any party from compliance with the requirements of this Part or section 17, but only on terms that are just and reasonable for all parties concerned;

(d) stay enforcement of rights provided in this Part or section 17 under any terms and conditions that the judge, in his discretion, considers just and reasonable;

(e) make any order necessary to ensure protection of the interests of any person in the collateral;

(f) make an order requiring a receiver or receiver-manager, or a person by or on behalf of whom he is appointed, to make good any default in connection with the receiver's or receiver-manager's custody, management or disposition of the collateral of the debtor or to relieve such person from any default on such terms as the court thinks fit,and to confirm any act of the receiver or receiver-manager.

* * *

(proposed Act)

63(1) In this section "secured party" includes a receiver.

(2) On application by a debtor, a creditor of a debtor, a secured party, a sheriff or any person with an interest in the collateral, a court may

(a) make any order, including a binding declaration of a right and injunctive relief, that is necessary to ensure compliance with this Part or sections 17, 36, 37 and 38,

(b) give directions to any person regarding the exercise of rights or the discharge of obligations under this Part or sections 17, 36, 37 and 38,

(c) relieve a person from compliance with the requirements of this Part or sections 17, 36, 37 and 38, but only on terms that are just and reasonable for all persons affected,

(d) stay enforcement of rights provided in this Part or sections 17, 36, 37 and 38,

(e) make any order necessary to ensure protection of the collateral.

COMMENT

There are very few differences of substance between section 63 of the proposed Act and section 63 of the existing Act. One difference is that in each subsection it is made clear that the powers given to a court under the section extend to secured parties' rights and obligations under sections 36, 37, and 38. Further, section 63(f) of the existing Act has been moved to section 64 of the proposed Act.

(existing Act)

56(1) A security agreement may provide for the appointment of a receiver or a receiver-manager and, except as provided in this Act, prescribe his rights and duties.

(2) Upon the application of any person entitled to make an application under section 63 and after notice has been given to any person that the judge directs a court may:

(a) appoint a receiver or receiver-manager;

(b) remove, replace or discharge a receiver or receiver-manager whether appointed by a court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver or receiver-manager;

(d) approve the accounts and fix the remuneration of a receiver or receiver-manager;

(e) make any order he thinks fit in the exercise of the jurisdiction of the court over receivers or receiver-managers.

(3) Notwithstanding *The Business Corporations Act* and *The Nonprofit Corporations Act*, in sections 17, 56-58, subsections 59(1) to (3) and (5) to (15) and sections 60 to 62, "secured party" includes a receiver and a receiver-manager.

(4) Unless a court orders otherwise:

(a) a receiver-manager is only required to comply with sections 17 and 57 to 62 when he disposes of collateral other than in the course of carrying on the business of the debtor; and;

(b) sections 61 and 62 do not apply whenever a receiver or receiver-manager has been appointed.

* * *

(proposed Act)

64(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, his rights and duties.

(2) A receiver shall

(a) take custody and control of the collateral in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Director of Corporations of the appointment or discharge,

(c) open and maintain, in the receiver's name as receiver, one or more accounts at a bank, credit union or other institution licensed to accept deposits in the Province for the deposit of all money coming under the receiver's control as receiver,

(d) keep records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the appointment financial statements of the administration in the form prescribed,

(f) indicate on every business letter, invoice, contract or similar document used or executed in connection with the receivership that the receiver is acting as a receiver,

(g) on completion of the receiver's duties, render a final account of the administration in the form prescribed to the Director of Companies.

(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing delivered to the receiver, require the receiver to make available for inspection the records

referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

(4) The debtor, and where the debtor is a corporation, a director of the debtor, sheriff, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing delivered to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final accounts referred to in subsection (2)(g) or to make them available for inspection during regular business hours at the place of business of the receiver in the Province.

(5) The receiver shall comply with the demand referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand, but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

(7) Upon application by an interested person, a court may

(a) appoint a receiver,

(b) remove, replace or discharge a receiver, whether appointed by a court or pursuant to a security agreement,

(c) give directions on any matter relating to the duties of a receiver,

(d) approve the accounts and fix the remuneration of a receiver,

(e) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed to make good a default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relief the person from any default on such terms as the court thinks fit,

(f) exercise with respect to receivers appointed pursuant to a security agreement the jurisdiction that it has over receivers appointed by the court.

(8) The powers referred to in subsection (7) and in section 63 are in addition to any other powers a court may exercise in its jurisdiction over receivers.

(9) Unless a court orders otherwise, a receiver is required to comply with section 59 and 60 only when the receiver disposes of the collateral other than in the course of operating the business of a debtor.

COMMENT

Consolidation of Statutory Law Relating to Receivers

The existing Saskatchewan Personal Property Security Act was the first of its kind in Canada to contain any significant amount of statutory regulation of receivers (including receiver-managers). However, the Act only went part of the way to the goal of having a single, integrated set of rules dealing with receiverships. The Commission has concluded that this goal should be an aspect of further development of this area of the law.

Under existing Saskatchewan law there are two sources of statutory rules applicable to receivers: Part V of The Personal Property Security Act and Division VIII (sections 89-95) of The Business Corporations Act. In addition, the rules of equity and the common law apply in some situations. This is a very unsatisfactory state of affairs. Where the debtor is a corporation and the collateral is personal property, the relevent provisions of both Acts apply. Where the debtor is a corporation and the collateral is real property only, The Business Corporations Act applies. Where the debtor is not a corporation and the collateral is personal property, The Personal Property Security Act applies. Where the debtor is not a corporation and the collateral is real property, neither Acts apply; the receivership is governed by the rules of equity, if a court appointed receiver is involved, and the laws of the common law and equity if a document appointed receiver is involved.

The Commission has concluded that all significant statutory rules relating to the regulation of receivers should be contained in a single statute and that statute should be The Personal Property Security Act. While its may seem somewhat anomalous to have this Act regulate receiverships of real property, it is the conclusion of the Commission that The Personal Property Security Act is the most appropriate source of rules applying to receivers since in the the greatest number of cases, a receivership will involve a security agreement providing for a security interest in personal property, either exclusively or along with a security interest in real property. It is a consequence of this decision that the Commission recommends the repeal of sections 89 to 96 of The Business Corporations Act and the inclusion of the following new provision in The Queen's Bench Act:

( ) Sections 64, 65(2), 65(3), 66 of The Personal Property Security Act apply, with necessary modification, to a receivership of property that is collateral under a security agreement, charge or mortgage to which The Personal Property Security Act does not otherwise apply.

The Proposed New Structure

Sections 64(1), 64(2), 64(7) and 64(9) of the proposed Act contain little that is entirely novel. The sources of most of these provisions are The Business Corporations Act and The Personal Property Security Act.

Sections 64(3) and (4) have no direct counterparts in existing legislation. The purpose of these provisions is to ensure that persons whose interests are affected by the conduct of a receiver have access to such information as is necessary for them to have in order to protect their interests in property in the control of a receiver. It is the conclusion of the Commission that the law should give to persons whose interests are directly affected by the conduct of a receiver the facilities to police the activities of receivers. The policy underlying these provisions is not the same as that underlying section 18. The role of section 18 is to facilitate disclosure of the existence, nature and extent of a security interest in the property of a debtor. Sections 64(3) and (4) are designed to facilitate the monitoring of the activities of a receiver as they relate to the management or disposition of collateral.

Under section 64(3) the debtor, or where the debtor is a corporation, a director of a debtor is entitled to inspect the books of the receiver. The power to inspect the books of the receiver will be very important in situations where a receiver-manager is carrying on the business of the debtor. Section 64(4) is less intrusive but gives a right of disclosure to a wider range of persons. Access to periodic financial statements is important to those who have an interest in seeing that the collateral is being dealt with in such a way as to ensure that any potential surplus over the amount owing to the secured party on whose behalf the receiver is acting is realized. The disclosure obligations of section 64(3) and (4) are in addition to the obligations of section 60(3).

(existing Act)

64(1) All rights, duties or obligations arising under a security agreement, under this Act or under any other applicable law, shall be exercised or discharged in good faith and in a commercially reasonable manner.

(2) Where a person fails to discharge any duties or obligations imposed upon him by this Act, any person has a right to recover

loss or damage which he suffered and which was reasonably foreseeable as liable to result from such failure.

(3) Except as otherwise provided for in this Act, any provision of any agreement which purports to limit the liability of a person for failure to discharge duties imposed upon him by this Act is void.

(4) In assessing damages under this Act, a court may consider as a mitigating factor evidence that the defendant employed reasonable diligence and took all reasonable precautions to discharge the duties and obligations imposed upon him by this Act.

(5) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the express provisions of this Act, supplement this Act and continue to apply.

* * *

(proposed Act)

65(1) In this section, "secured party" includes a receiver.

(2) The principles of the common law, equity and the law merchant, except insofar as they are inconsistent with the provisions of this Act, supplement this Act and continue to apply.

(3) All rights, duties, or obligations arising under a security agreement, under this Act or under any other applicable law shall be exercised or discharged in good faith and in a commercially reasonable manner.

(4) A person does not act in bad faith merely because the person acts with knowledge of the interest of some other person.

(5) If a person, without reasonable excuse, fails to discharge any duties or obligations imposed upon the person by this Act, the person to whom the duty or obligation is owed has a right to recover loss or damage that was reasonably foreseeable as liable to result from the failure.

(6) Where a secured party, without reasonable excuse, fails to comply with obligations

(a) in [subsection 43(12) or] section 49 or 50, or

(b) in section 17, 18, 59, 60 or 61 and the collateral is consumer goods,

the debtor or, in a case of non-compliance with section 43(14), 49 or 50, the person named as debtor in a financing statement or registration, is deemed to have suffered damages not less than the amount prescribed.

(7) Where a debtor or other person with an interest in land or collateral referred to in sections 49 or 50, respectively, without reasonable excuse, causes the Registrar of Land Titles or the Registrar to act as provided section 49(9) or 50(5), the secured party referred to in those sections is deemed to have suffered damages not less than the amount prescribed.

(8) In an action for a deficiency, the debtor may raise as a defence the failure on the part of the secured party to comply with obligations in section 17, 18, 59 or 60, but non-compliance limits the right to the deficiency only to the extent that it has affected the right of the debtor to protect the debtor's interest in the collateral or has made the accurate determination of the deficiency impracticable.

(9) Where a secured party fails to comply with obligations in section 17, 18, 59 or 60, the onus is on the secured party to show that the failure

(a) where the collateral is consumer goods, did not affect the debtor's ability to protect the debtor's interest in the collateral by redemption or reinstatement of the security agreement, or otherwise, and

(b) did not make the accurate determination of the deficiency impracticable.

(10) Except as otherwise provided in this Act, any provision in a security agreement or any other agreement that purports to exclude any duty or onus imposed by this Act, or purports to limit the liability of or the amount of damages recoverable from a person who has failed to discharge any duty or obligation imposed by this Act is void.

COMMENT

There are several important differences between section 65 of the proposed Act and its counterpart, section 64 of the existing Act. Each of these will be dealt with in turn.

Section 65(4)

Section 65(2) of the existing Act, like its counterpart in the existing Act, section 64(1), prescribes a test of good faith for the exercise of rights arising under the Act. While the matter has not yet arisen in litigation, unless the matter is addressed in the legislation, there is every reason to expect that Saskatchewan courts will be asked to determine in the context of the priority structure of the Act whether or not actions taken with knowledge of a pre-existing interest are actions taken in bad faith if the result of the actions is that the pre-existing interest is adversely affected. For example, section 35(1) provided that the first security interest to be registered has priority. However, is the holder of the perfected security interest precluded from asserting the priority given by section 35(1) on the grounds that he or she has acted in bad faith by taking his or her security interest with knowledge of the pre-existing security interest? The matter has arisen in the context of the former Ontario Act, but the decisions of the Ontario courts are not relevant in Saskatchewan since there is no equivalent to section 64(1) of the existing Act or section 65(2) of the proposed Act in the Ontario legislation.

The Commission has concluded that the matter should be specifically addressed in the proposed Act. This is the function of section 65(4). The section declares that acting with knowledge of a prior interest is not, by itself, bad faith. Of course, if more than knowledge of the prior interest is involved, the standard of conduct required by section 65(2) may not be met. For example, if a subsequent secured party has consciously encouraged or has conspired with the debtor to give to him or her a security interest that the secured party knows would violate the terms of a prior security agreement to which the debtor is a party, the conduct of the secured party might be found to be actions in bad faith.

Section 65(5)

The counterparts to section 65(5) of the proposed Act are sections 64(3)-(4) of the existing Act. There is only one difference between the existing provisions and section 65(5). The proposed Act imposes liability only if the failure to discharge the duties or obligations imposed occurred without reasonable excuse. Section 64(3) of the existing Act does not provide for exoneration. However, section 64(4) allows the court to take the conduct of the wrongdoer into consideration when assessing damages.

The Commission has decided that, while in most cases, the two different approaches are not likely to produce different results, the approach embodied in the proposed Act is to be preferred. The factors that section 64(4) of the existing Act requires a court to take into consideration are factors that should go to the issue of liability, rather than the quantum of damages payable.

Section 65(6)

There is no equivalent to this section in the existing Act. The purpose of the section is to twofold. The first objective is to provide economic inducement to secured parties to comply with the identified provisions of the Act. The second objective is to provide some recovery for persons whose rights have been violated, but who cannot establish that they suffered provable damages.

The Commission is convinced that the established approach to damage recovery for non-compliance with the existing Act is inadequate. Of particular concern are factual situations of the kind that arose in Canada Permanent Trust v. Thomas [1983] 6 W.W.R. 131 (Sask. Q.B.). In this case, a consumer debtor was unable to secure any legal redress even though the secured party failed completely to notify the debtor as to his rights of reinstatement and right of redemption. The case exemplifies the difficulty that debtors face in attempting to quantify the loss suffered when rights given to debtors are ignored or inadequately recognized by secured parties. In such situations, the inability of the debtor to demonstrate recoverable loss results in there being no sanction for non-compliance with the procedural requirements of Part V.

The effect of the section is to allow the debtor (or the person affected) to recover an amount prescribed by regulations (without the need to establish actual loss) if there is inexcusable non-compliance with the specified sections. It will be noted that, unlike section 65(6)(b), section 65(6)(a) is not confined to situations in which the collateral is consumer goods. The unexcused non-compliance with section 43(14) [the requirement that a debtor or person named as a debtor in a financing statement be given a copy of the financing statement], 49 or 50 [obligation to discharge a registration under The Land Titles Act or in the Personal Property Registry] results in the aggrieved party being entitled to recover deemed damages, regardless of the type of collateral (if any) that may be involved. The section reflects the view of the Commission that the rights provided in these sections are of sufficient importance to the proper functioning of the system that secured parties must be given an economic inducement to ensure that the rights are recognized.

The situation is somewhat different with respect to rights set out in sections 17, 18, 59, 60 or 61. It is the view of the Commission that, where consumers are involved, the enforcement aspect of a deemed damages provision is required since in many situations consumers will not be able to establish damages with the result that secured parties will have little inducement to take special measures to ensure that they comply with the requirements of the Act. However, where businesses are

involved, it will not be difficult to establish that non-compliance has resulted in a quantifiable business loss.

Section 65(7)

While there is no evidence that debtors have abused the rights given to them under sections 50 and 54 of the existing Act, the potential does exist for this to occur. To discourage abuses and strike a fair balance between secured parties and debtors, "deemed damages" similar to those that may be assessed against secured parties under s.65(6) may be awarded against debtors under this section. However, since debtors will often be persons who cannot absorb the amount of deemed damages as a cost of doing business, the amount of damages recoverable under this provision should be considerably less that than the amount prescribed for section 65(6).

Sections 65(8)-(9)

Prior to enactment of Personal Property Security Acts, courts in most Canadian jurisdictions that had Conditional Sales Acts concluded that non-compliance with the post-default procedural requirements of the Conditional Sales Acts automatically resulted in the loss of the conditional seller's right to recover the difference between the amount of the debt and the amount recovered on the sale of the collateral (the deficiency). It was held in Canada Permanent Trust v. Thomas, supra, that this approach is unwarranted under The Personal Property Security Act. The Commission has concluded that, as a starting point, the approach taken in the Canada Permanent Trust case is acceptable. Accordingly, section 65(8) provides that non-compliance with sections 17, 18, 59 and 60 does not automatically result in the loss of a right to a deficiency.

However, the Commission has concluded that the matter does not stop there. It recognizes that there were two underlying reasons for the position taken by the courts in the context of deficiency recovery under Conditional Sales Acts. The first was deterrence. As noted above, section 65(6) addresses this and, in the opinion of the Commission, nothing further is required. The second was the fact that non-compliance with the procedural safeguards contained in the legislation may have a direct effect on the deficiency from the debtor. If the non-compliance, (e.g. failure to give the prescribed notice to the debtor) results in the loss by the debtor of his or her right to redeem the collateral or reinstate the agreement and thereby avoid disposition of the collateral and a claim for the deficiency, the right to a deficiency should be lost. If the non-compliance results in a deficiency claim, the validity of which cannot be tested, no deficiency should be recoverable. Accordingly, section 65(8) of the proposed Act provides that the amount recoverable by the secured party as deficiency is affected by the extent that non-compliance has affected the right of the debtor to protect his or her interest in the collateral or has made the accurate determination of the deficiency

impracticable. It will be noted that there is no automatic loss of the right to a deficiency. The right is lost only in the prescribed circumstances.

The Commission has concluded that, since it is the secured party who has failed to meet the statutory requirements designed to protect the debtor, it would be unfair in some situations to place the onus of proof on the debtor to demonstrate the consequences of this non-compliance. Accordingly, under section 65(8), the secured party carries the onus of proof that the failure to comply with section 17, 18, 59 or 60, in the context of a situation where a consumer debtor is involved, did not affect the debtor's ability to protect his or her interest in the collateral by redemption of the collateral or reinstatement of the security agreement. Where the debtor is not a consumer, the onus to establish this remains with the debtor. The onus that is placed on the secured party will not be difficult to discharge in most cases. If, for example, a case with facts similar to those in the Canada Permanent Trust case comes before a Saskatchewan court after the proposed Act is adopted, the secured party might be able to discharge the onus of section 65(8)(a) by leading evidence to establish that the debtor was aware of his or her right to redeem or reinstate the security agreement. In this way the secured party could establish that the failure to give to the debtor the prescribed notice did not affect the ability of the debtor to protect his or her interest in the collateral. A secured party that wants to avoid difficulties resulting from an inadvertent failure to comply with the notice requirements of the Act can do so by inserting a notice in its security agreements informing debtors of their rights of redemption and reinstatement.

Where the non-compliance goes to the question of accurate determination of the deficiency, section 65(8)(b) does not distinguish between consumer and non-consumer debtors. In all situations of this kind, the secured party carries the onus of proof that, in spite of the non-compliance, it is practicable to determine with accuracy the amount of the deficiency. Again, however, this is not likely to be a heavy onus to discharge. The secured party might be able to discharge the onus through expert evidence as to the actual market value of the collateral at the date of the sale. In such a situation, even though the amount of the deficiency thus determined is less than that claimed, the non-compliance would not preclude recovery of the proper amount of the deficiency.

Section 65(10)

Section 65(10) of the proposed Act is broader in scope than its counterpart in the existing Act, section 64(2), in that it addresses agreements that attempt to eliminate the duties and obligations prescribed by the Act and agreements that purport to limit liability or the damages recoverable for failure to discharge those duties and obligations. Section 64(2) of the existing Act addresses only the latter.

(existing Act)

68 An appeal lies from an order, judgment or decision of a judge or the court to the Court of Appeal within the time and in accordance with the practice and procedure established in the rules of the Court of Appeal.

* * *

(proposed Act)

66(1) On application of an interested person, a court may

(a) make an order determining questions of priority or entitlement to collateral, or

(b) direct an action to be brought or an issue to be tried.

(2) An appeal lies to the Court of Appeal from an order, judgment or direction of a court made under this Act.

COMMENT

There is no direct equivalent to section 66(1) in the existing Act. However, Saskatchewan courts have proceeded on the basis that the jurisdiction to decide questions of priority or entitlement to collateral in summary applications is contained in section 63 of the existing Act. (See Canadian Imperial Bank of Commerce v. Borg-Warner Acceptance Canada Ltd. (1985), 40 Sask. R. 202 (Sask. Q.B.).) While there is basis for doubt that section 63 provides jurisdiction to deal with matters other than those arising in the context of Part V (which does not deal with priorities), the Commission is of the view that courts should have the jurisdiction to decide priority disputes in summary proceedings where the circumstances permit. It is for this reason that section 66(1) has been included in the proposed Act.

(existing Act)

65 Where in this Act, other than in sections 5 to 7, 13 and 34, Part IV and this Part, any time is prescribed within which or before which any act or thing must be done, a judge, on application, may extend or abridge the time for compliance on any terms and conditions that he considers just and reasonable.

* * *

(proposed Act)

67 Where in section 11 and in sections 36(14), 38(13) and 43(14) and Part V of this Act, a time is prescribed not later than or before which an act or thing must be done, a court, on application made before or after the time has expired, may extend or abridge, conditionally or otherwise, the time for compliance.

COMMENT

Section 67 of the proposed Act eliminates any uncertainty associated with section 65 of the existing Act, the circumstance in which a court may extend or abridge the time for compliance.

(existing Act)

67(1) Where under this Act a notice or any other written matter may be or is required to be served, it may be served on:

(a) an individual, by personal service or by registered mail addressed to him at his residence or place of business and, if he has more than one place of business, at any one of his places of business;

(b) a partnership:

(i) by personal service upon:

(A) any one or more of the partners;

(B) any person having, at the time of service,control or management of the partnership business at the principal place of business of the partnership within the province;

(ii) by registered mail addressed to:

(A) the partnership;

(B) any one or more of the partners;

(C) any person having, at the time of service, control or management of the partnership

business at the principal place of business of the partnership within the province;

at the post office address of the principal place of business of the partnership within the province;

(c) a body corporate, by delivery to the registered office of the body corporate or by registered mail addressed to the body corporate at its registered office;

(d) an extra-provincial body corporate, by delivery to the attorney for the body corporate appointed under section 268 of *The Business Corporations Act* or section 251 of *The Non-profit Corporations Act* or by registered mail addressed to the body corporate at the address of such attorney.

(2) Service by registered mail is effected when the addressee actually receives a notice or any other written matter, or upon the expiry of four days after the day of registration, whichever is earlier.

(4) Where a notice or any other written matter may be served by registered mail to the post office address as it appears on a registered financing statement or security agreement and:

(a) no financing statement was required to be registered and no sufficient address appears on the security agreement; or

(b) no document is registered and the security interest is deemed to be perfected under subsection 72(3);

the notice or other written matter shall be served in accordance with subsection (1). 1979-80, c. P-6.1, s. 67.

* * *

(proposed Act)

68(1) A notice, demand, other than a demand under section 18, [or copy of a financing statement or verification statement referred to in section 43(12)] may be given

(a) to an individual, by leaving it with the individual or by sending it by registered mail addressed to

(i) the individual at the individual's residence, and

(ii) where the individual is the sole proprietor of a business, the name of the individual at the address of the business,

(b) to a partnership

(i) by leaving it with

(A) any one or more of the general partners, or

(B) any person having at the time of the delivery, control or management of the partnership business, or

(ii) by registered mail addressed to

(A) the partnership,

(B) any one or more of the general partners, or

(C) any person having at the time of the delivery control or management of the partnership business,

at the address of a partnership business,

(c) to a corporation, other than a municipality

(i) by leaving it with an officer or director of the corporation or person in charge of any office or place of business of the corporation,

(ii) by leaving it with or by sending it by registered mail addressed to the registered or head office of the corporation,

(iii) where the corporation has its registered or head office outside the Province, by leaving it with or by sending it by registered mail addressed to the attorney for the corporation,

(d) to a municipal corporation by leaving it with or by sending it by registered mail addressed to the principal office of the corporation or to the chief administrative officer of the corporation,

(e) to an association

(i) by leaving it with an officer of the association, or

(ii) by sending it by registered mail addressed to an officer of the association at the address of the officer, and

(f) to Her Majesty in the right of Saskatchewan as provided in The Proceedings Against the Crown Act.

(2) The giving of a document referred to in subsection (1) registered mail occurs

(a) when the addressee actually receives the notice or demand, or

(b) except in cases where the postal services are not functioning, on the expiration of ten days after the date of registration,

whichever is earlier.

COMMENT

The proposed Act, unlike the existing Act, avoids use of the terms "serve", "serves" or "served" when referring to transmittal of notices or documents from one person to another. The reason for this is that reference to "service" of documents carries with it the connotation of service of documents as provided in the Queen's Bench Rules of Court or other legislation. Since there is no intention that the Rules of Court apply to the transmittal of notices and documents under the Act, the Commission concluded that potential uncertainty would be avoided if the term "given" were used. The term is used to refer to personal delivery and receipt of the document involved and "delivery", actual or deemed, by mail.

The Commission has concluded that section 67(1)(c) of the existing Act is too narrow in that it requires that documents be delivered to the registered office of a corporation. There will be situations in which the person who is delivering the notice does not have the sophistication to be able to determine what the registered office of a corporation is. Consequently, fairness requires that the provision be reformulated so as to state a rule that is less demanding. It will be suggested that section 65(1)(c) creates problems for large organizations such as banks since the document can be delivered to the manager of any branch of the bank and need not be delivered to the manager in charge of the branch responsible for the matter to which the document relates. It is the conclusion of the Commission that these problems are not significant. Large corporations have sophisticated systems for internal communication. In any event, a delay in getting the document to the correct branch of the company is not likely to have significant consequences. If the document requires a specific response within a set period of

time, the failure to respond within that time rarely has automatic consequences. (See e.g. sections 18(10), 49(9), 50(5)-(6), 65(5)-(6).) There are situations in which the delay in getting a notice to the appropriate branch of a company may affect the rights of a secured party. For example, such a delay may result in a lender making future advances on the appearance of ownership by its debtor of newly-acquired collateral when, in fact, the collateral is subject to a purchase money security interest, notice of which has been given to a branch of the company and not immediately transmitted to the branch making the loans. However, the incidence of this type of problem is too small to be a matter of great concern. In any event, a secured party can guard against problems in this context by simply obtaining a search result which will disclose the existence of a purchase money security interest in inventory in the possession of the debtor. (See section 34(2).)

It is relevant to note that "a notice" under section 68 is different from knowledge under section 2(2). Section 68 must be read as applying only in conjunction with sections that refer to the delivery of a notice or demand and with section 43(14). Under section 2(2)(c), a corporation has knowledge, inter alia, for the purposes of the Act when written information has been delivered to the corporation's registered office or attorney for service. It is not possible for a corporation to have deemed knowledge when the written information is sent by mail. If this form of communication is used, the written information must actually reach the corporation.

It will be noted that the deemed delivery rule of section 68(2) does not apply where there are disruptions in postal services.

(existing Act)

69(1) Where there is a conflict between a provision of this Act and a provision of *The Limitation of Civil Rights Act*, *The Exemptions Act*, *The Distress Act*, *The Agricultural Implements Act* or *The Saskatchewan Farm Security Act*, the provision of that Act prevails.

(2) Where there is a conflict between a provision of this Act and a provision of any Act for the protection of consumers, the provision of that Act prevails.

(3) Except as otherwise provided in this or any other Act, where there is a conflict between a provision of this Act an a provision of any general or special Act other than those mentioned in subsections (1) and (2), the provision of this Act prevails.

* * *

(proposed Act)

69(1) If there is a conflict between a provision of this Act and a provision of The Limitation of Civil Rights Act, The Exemptions Act, The Distress Act, The Agricultural Implements Act, or The Saskatchewan Farm Security Act or a provision for the protection of consumers in any other Act, the provision of that Act prevails.

(2) Except as otherwise provided in this or any other Act, where there is a conflict between a provision of the Act and a provision of any other Act other than those referred to in subsection (1), the provision of this Act prevails.

COMMENT

There are no changes of substance in this provision.

(existing Act)

70(1) A reference, in any general or special Act that relates to a security interest in personal property or fixtures to which this Act applies, to *The Assignment of Book Debts Act*, *The Bills of Sale Act*, *The Conditional Sales Act*, or *The Corporation Securities Registration Act*, or any provision thereof, is deemed to be a reference to this Act or the corresponding provision of this Act, as the case may be.

(2) A reference in any Act to a chattel mortgage, lien note, conditional sales contract, floating charge, pledge, assignment of book debts, or any derivative of these terms, or to any transaction which under this Act is a security agreement, is deemed to be a reference to the corresponding type of security agreement under this Act.

(3) A reference in this Act to :

(a) *The Assignment of Book Debts Act*;

(b) *The Bills of Sale Act*;

(c) *The Conditional Sales Act*; or

(d) *The Corporation Securities Registration Act*;

is deemed to be a reference to that Act as it existed on the day before the coming into force of this Act.

* * *

(proposed Act)

70(1) A reference in any Act, regulation or writing to The Assignment of Book Debts Act, The Bills of Sale Act, The Conditional Sales Act, or The Corporation Securities Registration Act that relates to a security interest is deemed to be a reference to this Act or of the corresponding provision of this Act.

(2) A reference in any Act to a chattel mortgage, lien note, conditional sales contract, floating charge, pledge or assignment of book debts or the like, or any derivative of these forms, is deemed to be a reference to the corresponding kind of security agreement under this Act.

COMMENT

The only change of significance between this section and its counterpart in the existing Act is that it contains no equivalent to subsection (3).

TRANSITION

(existing Act)

71(1) This Act applies:

(a) to every security agreement made after this Act comes into force;

(b) subject to subsections (2), (3) and (4), to every prior security interest as defined in section 72 which is not validly terminated, completed, consummated or enforced in accordance with the prior law before this section comes into force.

(2) The validity of a prior security interest as defined in section 72 is governed by prior law.

(3) The order of priorities:

(a) between security interests is determined by prior law, if all of the competing security interests arose under security agreements entered into before this Act comes into force; and

(b) between a security interest and the interest of a third party is determined by prior law, if the third party arose before this Act comes into force and the security interest arose under a security agreement entered into before this Act comes into force.

(4) This Act applies to security interests created under:

(a) renewal, extension, refinancing or consolidation agreements made after this Act comes into force;

(b) revolving credit transactions entered into force and continuing after this Act comes into force.

* * *

(proposed Act)

71(1) In this section and section 72,

(a) "prereform law" means law in force immediately before the coming into force of "prior law".

(b) "prior law" means law in force immediately before the coming into force of this Act.

(c) "prior security interest" means

(i) a security interest as defined in The Personal Property Security Act R.S.S. 1978, c. P-6.1 and to which that Act applied, and

(ii) an interest created, reserved or provided for by a valid security agreement or other transaction made before this Act comes into force that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the security agreement or other transaction was entered into.

(2) Subject to subsections (9) and (10), nothing in this Act affects the continued validity and enforceability under prior law of a prior security interest that is not a security interest under this Act.

(3) Except as herein provided, this Act applies

(a) to every security agreement made after this Act comes into force, including an agreement that renews, extends, or consolidates an agreement made before this Act comes into force, and

(b) to every security agreement made before this Act comes into force that has not been validly terminated in accordance with prereform law or prior law before this Act comes into force, and

(c) subject to subsection (5), to every prior security interest that is not enforced or otherwise validly terminated in accordance with prereform law or prior law before this Act comes into force,

(e) to a receiver appointed before or after this section comes into force.

(4) Sections 10 and 11 do not apply to a security agreement referred to in subsection (2)(b).

(5) Except as provided in subsections (6), (7), (8) and (10) this Act does not apply to a prior security interest that is not a security interest under this Act.

(6) The validity of a prior security interest is governed by the law in force when the security interest was created.

(7) The order of priorities

(a) between prior security interests is determined by pre reform law if all the competing security interests arose under security agreements entered into before prior law came into force or this Act comes into force, and

(b) between a prior security interest and the interest of a third party is determined by prereform law, if the third party interest arose before this Act comes into force and the security interest arose under a security agreement entered into before prior law came into force.

(8) The order of priorities

(a) between prior security interests is determined by prior law, and

(b) between a prior security interest and the interest of a third party is determined by prior law, if the third party interest arose before this Act comes into force.

(9) The order of priorities between an interest arising after this Act comes into force and a prior security interest is determined by this Act.

(10) The order of priorities between an interest arising after this Act comes into force and a prior security interest that is not a security interest under this Act is determined by this Act as would be the case if the prior security interest were within the scope of this Act.

(11) Subsections (9) and (10) do not apply where the prior security interest is

(a) a lease for a term of more than one year of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land.

(b) an assignment of rental payments payable under a lease of real property.

(12) Notwithstanding the repeal of prereform law or prior law, this law continues in force, as if it had not been repealed, to the extent necessary to give effect to this section and section 72.

COMMENT

While the matter of transition from the existing Act to the proposed Act must be addressed somewhat differently than transition from the former regime to the existing Act was addressed, the considerations involved are essentially the same. The basic issue involves the question as to what extent security interests created under prior law are to be regulated by the new regime. The additional complexities that are encountered in the context of transition from the existing Act to the proposed Act are associated with the fact that a few interests that are treated as security interests under the existing Act are not within the scope of the proposed Act and a few interests that are treated as security interests under the new Act are not within the scope of the existing Act. In addition, some accommodation must be made for security interests arising under pre-Personal Property Security Act law that, in some respects, remain outside the scope of either the existing or proposed Acts. The apparent complexity of section 71 is a product of the need to ensure that legitimate interests are not adversely affected through a change in law brought about by the implementation of the proposed Act.

The term "prior law" as used in section 71 refers only to the existing Act. The proposed Act will apply to security agreements entered into before the existing Act came into force. (See section 71(3)(b)-(c).) The only exception is set out in section 71(4) which exempts all prior agreements from the requirements of sections 10 and 11. The term "prereform law", has been adopted to indicate pre-Personal Property Security Act law that provided for the creation and regulation of security interests.

The term "prior security interest" as defined in section 71 includes interests arising under the existing Act and security interests arising under pre-Personal Property Security Act law that fall within the definition of "security interest" in section 2(1)(nn) of the existing Act. It also includes interests that were excluded from the scope of the existing Act but which would qualify as security interests under the proposed Act if they had arisen after the Act comes into force.

One conceptually difficult problem that requires special treatment is that which arises when an interest that is a security interest under the existing Act is no longer treated as such under the proposed Act. As a matter of public policy, it would be unreasonable that the enactment of the proposed Act would result in such a security interest being abolished. However, if such interests are to be preserved, it is necessary to make specific provision to this effect and to identify a source of priority rules to deal with conflicts between such interests and interests arising under the proposed Act. (See sections 71(2) and 71(5)-(8) and 71(10).)

The Commission has reviewed all of the provisions of the proposed Act and has concluded that general transitions rules can be used to address the problems that arise in this context. [The issue raised here should be distinguished from the related, but separate issue as to whether or not the holder of a security interest arising under the existing Act must meet new or different perfection requirements prescribed by the new Act. This matter is addressed in section 72].

It will be noted that the approach that has been adopted is that where the interests in conflict have all arisen under pre-Personal Property Security Act law, neither the existing nor the proposed Act applies. (See section 71(7).) Where the interests in conflict have all arisen under the existing Act, the existing Act continues to apply. (See section 71(8).) Where at least one of the interests in conflict arose under the existing Act or after the existing Act came into force, the existing Act applies. (See section 71(8).) However, where at least one of the interests in conflict arose under the proposed Act or after the proposed Act came into force, the proposed Act applies. (See section 71(9).) Special rules apply, however, where the prior security interest involved is one to which the proposed Act would not otherwise apply because it is not a security interest under the proposed Act. In such a case, the proposed Act is deemed, for the purposes of priorities to apply to such prior security interests. (See section 71(10).)

The operation of section 71 is displayed in the context of the following situations. These situations are all ones in which there is an important difference between the existing Act and the proposed Act. However, the following does not purport to contain an exhaustive enumeration of all of the situations in which these differences exist. They have been chosen as examples only.

Definition of "accession" - section 2(1)(a) (proposed Act)

As noted earlier in this report, the definition of "accession" under the proposed Act is much broader than under the existing Act. One of the aspects of this broader definition is that the priority structure of section 38, rather than the regular priority structure of the Act would apply. In particular, a security interest in an item of goods that was not an accession under prior law but is an accession under the proposed Act would not have priority over someone with an interest in the "other goods" under section 38(4) unless the consent or acquiescence of such person is obtained. No such consent or aquiescence would be necessary under section 37 of the existing Act. However, this difference in treatment will not place the security interest in jeopardy. Any priority dispute between the holder of an interest in the other goods and the holder of a security interest in the accession goods will be determined in accordance with prior law and not the proposed Act. (See section 71(8)(b).) No doubt, section 38 of the proposed Act will apply to the enforcement of the security interest in the accession. (See section 71(3)(c).) However, it is the view of the Commission that the procedural requirements of section 38 do not differ sufficiently from what would have been required under prior law to justify their exclusion. For example, under section 38(8) the secured party must reimburse a person who has an interest in the other

goods for any damage to his interest in the other goods caused during removal of the accession. There is no such requirement under the existing Act where goods, other than accessions, are attached to other goods. However, as a practical matter, it is very unlikely that problems will arise in this context. Goods in which separate security interests are taken are almost always of a kind that can be removed without damage to the goods to which they are attached. In the very few cases where a problem arises, a court has the power under section 63(2)(c) to relieve the secured party from compliance with section 38(8).

Definition of "building materials" - Section 2(1)(d) (proposed Act)

The definition of "building materials" in the proposed Act is arguably broader that its counterpart in the existing Act. The result is that a wider range of items can become fixtures under the existing Act than under the proposed Act. For example, it might be that items such as external windows, external door frames, siding, etc. are not within the scope of the definition of "building materials" in the existing Act, but are within the definition of that term in the proposed Act since their removal might result in weakening the structure of the building or exposing it to weather damage or deterioration. Someone might have a security interest in such items taken under the existing Act. When this security interest comes into competition with an interest in the real property after the proposed Act comes into effect, the priority position of the holder of the security interest is determined under section 36 of the proposed Act. (See section 71(10).) This is so even though the security interest taken under the existing Act would not otherwise be treated as a security interest under the proposed Act. Persons taking interests in real property after the proposed Act comes into force will be forewarned of the existence of a prior security interest in items such a windows, etc. through the mandatory registration under the existing Act that is carried over for this purpose to the regime established by the proposed Act. Provisions equivalent to section 72(2) will have to be included in the regulations providing for registration under The Land Titles Act.

Definition of a "lease for a term of more than one year" - section 2(1)(y) (proposed Act)

As noted earlier in this report, the definition of a lease for a term of more than one year in the proposed Act is narrower than its counterpart in the existing Act in that, under the proposed Act, it excludes leases of household furnishings or appliances as part of a lease of land where the goods are incidental to the use and enjoyment of the land. The Commission has concluded that a priority dispute between the lessor under a lease of land and household furnishings entered into before the proposed Act comes into effect and a buyer of those household furnishings who acquired his or her interest after the proposed Act comes into force should be determined without regard to the priority rules of the proposed (or existing) Act. (See section 71(11)(a).) The reason for this provision is that, since such leases are no longer to be within the regulatory regime of the proposed

Act, the lessor should not be required to maintain registration in order to protect persons who acquire interests in the goods after the proposed Act comes into force. If the buyer acquired his or her interest before the proposed Act comes into effect, prior law provides the source of priority rules. (See section 71(8).)

Definition of "proceeds - section 2(ee) (proposed Act)

It will be noted that the definition of the concept of "proceeds" in section 2(ee) of the proposed Act differs from its counterpart in section 2(ee) of the existing Act in that it states what appears to be an additional requirement. Under the proposed Act, the debtor must acquire an interest in the property claimed as proceeds by the secured party. The Commission has concluded that no special measures are required to accommodate this difference. It is the view of the Commission that section 2(ee) of the proposed Act merely makes explicit what is implicit in section 2(ee) of the existing Act.

Section 178 Bank Act interests - section 4(k) (proposed Act)

A significant transitional problem arises in the context of security interests that arise out of section 178 Bank Act security agreements. Section 4(k) of the proposed Act excludes from the scope of the legislation a security agreement governed by section 178 of the Bank Act. While there remains doubt in the matter, there is obiter dicta in Bank of Montreal v. Pulsar Ventures Inc. and City of Moose Jaw [1988] 1 W.W.R. 250 (per Vancise J. at p. 258) suggesting that a section 178 Bank Act security interest is a security interest to which the existing Act applies. If this decision represents existing law, the effect of the enactment of the proposed Act will be to prevent any future section 178 interests from being treated as security interests. However, there remains the question as to the status of section 178 security interests created before the proposed Act comes into force.

The Commission has decided that such prior interests must be recognized under the proposed Act to the extent (if any) that they are recognized under existing law. (See section 71(2).) There remains the question as to what system of priority rules should be applied where such an interest comes into conflict with an interest created after the proposed Act comes into effect. The Commission has decided to apply in this context a special rule that where a prior security interest comes into conflict with a security interest arising under the proposed Act, the priority structure of the proposed Act should apply. (See section 71(10).) This approach comes the closest to fulfilling the expectations of the person who acquires an interest under the new legal regime. Since the proposed Act does not apply to section 178 Bank Act security interests, it has been necessary for this purpose to deem that it does.

Definition of "purchase money security interest" - section 2(gg) (proposed Act)

As is the case with the definition of "proceeds" in the proposed Act, this definition contains additional features which, in the opinion of the Commission, are implicit in the corresponding definition in the existing Act. Consequently, no special measures need be taken to facilitate transition.

Assignments of Rental Payments - section 4(f) (proposed Act)

It will be noted that earlier in this report the Commission recommended that assignments of rental payments arising under leases of real property be excluded from the scope of the new Act and that The Land Titles Act be amended to provide a priority structure for competing interests in rental payments. If this recommendation is implemented, there will remain the question as to the law applicable to priority disputes between an assignee who has taken and perfected under the existing Act an interest in rental payments and an assignee who has taken and registered an interest in the same rental payments under the proposed new provisions of The Land Titles Act. The problem is exacerbated by the fact that the proposed new provision deems the interest taken after the the new provision comes into force to be an interest in land. The result is that the interest acquired under the existing Act is an interest in personal property, while the competing interest is an interest in land.

The Commission has decided that the most efficacious way to address this problem is to apply to the priority dispute the priority structure of the proposed new provisions of The Land Titles Act and to provide a transition registration provision (deemed registration) for the holder of the interest acquired under the existing Act. It is for this reason that section 71(11)(b) has been included in the proposed Act and the proposed section 124.3 of The Land Titles Act has been recommended. This provision states:

> (5) An assignment of rights in rents to which The Personal Property Security Act R.S.S. 1978, c. P-6.1 applies, is deemed to have been registered by caveat against the title to the land under lease, and such registration continues for a period of six months after the date this section comes into force.

It is recognized that the effect of this provision is to temporarily negate the basic principle of The Land Titles Act by deeming the registration of a caveat. However, the period of deemed registration is very short.

Section 13 - proposed Act

Section 13 of the proposed Act limits the efficacy of after-acquired property clauses in a manner not found in section 13 of the existing Act. As a consequence,

certain security interests in consumer goods that are valid under the existing Act could not be taken under the proposed Act.

The Commission has concluded that this is an appropriate case for the application of sections 71(2) and 71(10), the effect of which is to preserve the validity and enforceability (under Part V of the proposed Act as a result of section 71(3)(c)) of the prior security interest and to subject it to the priority rules of the proposed Act as if it were a security interest under the Act.

(existing Act)

72(1) In this section:

(a) "prior security interest" means an interest created, reserved, or provided for by a security agreement or other transaction validly created or entered into, before this section comes into force, that is a security interest within the meaning of this Act and to which this Act would have applied if it had been in force at the time the security agreement or other transaction was created or entered into;

(b) "prior registration law" means *The Assignment of Book Debts Act*, *The Bills of Sale Act*, *The Conditional Sales Act*, *The Corporation Securities Registration Act* and section 42 of *The Agricultural Implements Act*.

(2) A prior security interest that, when this section comes into force:

(a) is covered by:

(i) an unexpired filing or registration under a prior registration law is, subject to subclause (ii), deemed to have been registered and perfected under this Act and, subject to this Act, such filing or registration continues for the unexpired portion of the filing or registration period; and

(ii) an unexpired registration under *The Assignment of Book Debts Act*, or section 19 of *The Bills of Sale Act*, is deemed to have been registered and perfected under this Act, and such registration continues for a period of three years from the day this section comes into force; and the filing or registration, as the case may be, may be further continued by registration of a renewal statement

under this Act where the security interest could be perfected by registration if it were to arise after this Act comes into force; and

(b) is covered by a registration under *The Corporation Securities Registration Act* is deemed to have been registered and perfected under this Act, and such registration continues from the day this section comes into force until discharged under section 50.

(3) A prior security interest validly created, reserved or provided for under any prior law, which gave that interest the status of a perfected security interest without filing or registration under any prior registration law and without the secured party taking possession of the collateral, is perfected within the meaning of this Act as of the date the security interest attached, and, subject to subsection (4), that perfection continues for two years from the day this section comes into force, after which it becomes unperfected unless otherwise perfected under this Act.

(4) The time limit in subsection (3) does not apply to trust indentures.

(5) A prior security interest that, when this section comes into force, could have been but was not:

(a) covered by filing or registration under a prior registration law;

(b) perfected under prior law through possession of the collateral by the secured party;

may, if permitted by this Act, be perfected by registration or possession in accordance with this Act.

(6) A prior security interest that, under this Act, may be perfected by the secured party's taking possession of the collateral is perfected for the purposes of this Act by such possession, whether such possession occurred before or after this section comes into force and notwithstanding that the prior law did not permit the perfection of the security interest by such possession.

(7) The perfection of a prior security interest that, when this section comes into force, was covered by an unexpired filing or registration under a prior registration law, and for the perfection of which under this Act no registration of a financing statement is required, continues under this Act.

(8) A prior security interest that, when this section comes into force, could have been, but was not, covered by a filing or registration under a prior registration law and that, under this Act, may be perfected without registration of a financing statement and without possession of the collateral by the secured party is perfected under this Act provided that all other conditions for the perfection of the security interest are satisfied.

* * *

(proposed Act)

72(1) In this section, "prior registration law" means

(a) the The Corporation Securities Registration Act as it existed before the coming into force of The Personal Property Security Act, R.S.S. 1978, c. P-6.1 and

(b) The Personal Property Security Act, R.S.S. 1978, c. P-6.1 and it existed immediately before the coming into force of this Act.

(2) Except as otherwise provided in this section, a prior security interest that, when this Act comes into force, is covered by an unexpired filing or registration under prior registration law is deemed to have been registered and perfected under this Act and, subject to this Act, the registered and perfected status of such interest continues for the unexpired portion of the filing or registration, as the case may be, and may be further continued by registration under this Act if

(a) the prior security interest could have been perfected by registration if it had arisen after this Act came into force, or

(b) the prior security interest is a security interest referred to in sections 71(2) of this Act.

(3) A prior security interest is covered by an unexpired filing or registration under prior law within the meaning of subsection (2) where the requirements for perfection of the security interest under prior law have been met, whether or not the requirements for perfection of the security interest under this Act have been met.

(4) For the purposes of subsection (3), the requirement for perfection of a security interest are met when the security

interest has the status in relation to the interest of other secured parties, buyers, judgment creditors or the trustee in bankruptcy of the debtor, similar to that of an equivalent security interest created and perfected under this Act.

(5) A registration of a prior security interest that, when this Act comes into force, has not expired under prior registration law, is deemed to continue for the purposes of prior registration law for the unexpired portion of the registration period, and may be further continued by registration under this Act.

(6) A prior perfected security interest in crops is deemed to be registered in accordance with section 49 as of the date this Act comes into force and such registration continues for a six months after this Act comes into force and may thereafter be continued by registration in accordance with section 49.

(7) A prior security interest in an instrument in the form of a letter of credit or advice of credit that is perfected by registration that continues after this Act comes into force is deemed to be perfected by possession in accordance with section 24 for a period of six months from the date this Act comes into force, and thereafter the security interest is perfected by possession only when the secured party has taken actual possession of it in accordance with section 24.

(8) A prior security interest in accounts arising out of the provision of professional services or a security interest in a claim for damages or a judgment representing a right to damages, other than a right to damages in tort

(a) is deemed perfected for the purposes of sections 20(a) and (b), and

(b) is perfected for all other purposes as of the date such interest was perfected under the law applicable at the time of its creation and that perfection continues for one year from the date this Act comes into force, and thereafter it becomes unperfected unless it is otherwise perfected under this Act.

(9) For the purposes of subsection (8), a security interest was perfected under the applicable law when the secured party has complied with the law with respect to the creation and continuance of the security interest and the security interest has the status in relation to the interest of other secured parties and buyers similar to that of an equivalent security interest created and perfected under this Act.

(10) A prior security interest that, when this Act comes into force, could have been, but was not

(a) filed or registered under prior registration law, or

(b) perfected under prior law through possession of the collateral by the secured party,

may, if it is a security interest that could have been perfected by registration or possession under this Act if it had arisen after this Act comes into force, may be perfected by registration or possession in accordance with this Act.

(11) Section 7(3), to the extent that it requires registration in the jurisdiction where the transferee of the collateral is located, does not apply to a security interest created before this Act comes into force.

COMMENT

Since transition from the existing system to the system to be established under the proposed Act is quite different from the transition from the pre-Personal Property Security Act regime to the system of the existing Act, section 72 of the proposed Act is different in many respects from its counterpart in the existing Act.

Sections 72(2)-(4) of the proposed Act provide for the continuation of registrations effected under the existing Act or under The Corporation Securities Registration Act, R.S.S. 1978, c. C-39. This continuation applies not only to those interests that are security interests under the proposed Act, but as well to interests that are (or may be) security interests under the existing Act but which are not recognized as such under the proposed Act. The most important example of this is a section 178 Bank Act interest. Since section 71(10) subjects these interests to the priority regime of the proposed Act when they come into competition with interests arising after the proposed Act comes into force, and since the continued perfection of these interests will be important when they come into competition with interests arising under prior law, it is necessary to permit the continuation of the registration of these interests after the proposed Act comes into force.

Section 72(5) of the proposed Act is designed to permit continuation of registration under prior registration law. This is important since priorities involving interests arising under prior law are determined by reference to prior law. (See sections 71(7)-(8).)

Section 72(3) makes it clear that a difference between the registration requirements of prior registration law and those of the proposed Act do not affect the continuation of the prior registration under the proposed Act.

Under section 37 of the proposed Act a notice of a security interest in a growing crop must be registered in a land titles office in order for it to have priority over certain subsequently-acquired interests in the land on which the crop is grown. However, since there is no equivalent in the existing Act to section 37 of the proposed Act, a security interest in a growing crop taken under the existing Act can be perfected without registration in a land titles office. Consequently, it is necessary to provide a period of grace during which the holders of prior security interests in crops can become apprised of the necessity to comply with sections 37 and 49 of the proposed Act. Section 72(6) provides for this. It will be noted that the period allowed is very short.

Under section 2(1)(v) of the proposed Act, a letter of credit or an advice of credit is an instrument, if it states on it that it must be surrendered on claiming payment. The effect of treating such letters of credit as instruments is that a security interest in them can be perfected by possession under section 24 of the proposed Act and section 31 applies to them. Under section 31(3) a good faith purchaser for value of the instrument has priority over a registered security interest in the instrument.

Section 72(7) is designed to provide a very short period of grace during which holders of prior registered security interests in this type of collateral can be apprised of the necessity to perfect their interests by possession in order to avoid subordination under section 31(3).

Section 72(8) provides a period of deemed perfection for security interests in accounts generated from the provision of professional services and security interests in claims for damages and judgments represented by damages other than a judgment for damages in tort. Since such security interests are not within the scope of the existing Act, perfection of the interest would have to be effected in accordance with the applicable law. As a result of sections 3, 4(c) and 4(i) [by implication] of the proposed Act, such security interests fall within the scope of the Act. The effect of section 72(7) is to recognize for a period of one year that perfection under the applicable law is perfection under the proposed Act.

Section 72(11) exempts from the operation of section 7(3) of the proposed Act a security interest arising under prior law. The reason for this exclusion is that section 7(3) contains requirements, not contained in section 7 of the existing Act, with respect to situations where the collateral has been transferred to a person in another jurisdiction. It might be impossible to meet these requirements because the specified time periods have expired by the time the proposed Act comes into force.

(existing Act)

73 For the purposes of carrying out the provisions of this Act according to their intent, the Lieutenant Governor in Council may make regulations:

(a) prescribing a list of goods the lease of which is not covered by this Act by virtue of subclause (2)(y)(v);

(b) prescribing the amount of any charge to which the secured party is entitled under section 18;

(c) prescribing the duties of the registrar;

(d) prescribing business hours for the offices of the registry or any of them;

(e) respecting the registry, including the transition from any prior registry systems to the system established under this Act;

(f) requiring the payment of fees and prescribing the amount thereof and their manner of payment;

(g) prescribing the form and content of:

(i) financing statements and financing change statements required or permitted to be registered in the registry under this or any other Act, and the manner of their use and for requiring that such documents used, or any of them, must be those provided by the registrar;

(ii) notices required or permitted to be filed under section 54 in a land titles office and the manner of their use;

(h) prescribing the form of any notices required or allowed to be given under this Act and providing for their use;

(i) prescribing the amounts of compensation payable under section 53;

(j) requiring or permitting the use of a statement to confirm the registration of any financing statement or financing change statement and permitting the amendment of an error in registering on the part of the registrar or the registry and prescribing the limits of such amendments;

(k) prescribing abbreviations, expansions or symbols that may be used in a financing statement, financing change statement, or any other form authorized or required by this Act or in the recording or production of information by the registrar;

(l) governing the right of a secured party to indicate the length of time during which a financing statement or a financing change statement renewing the financing statement shall be effective;

(m) defining any word or expression used in this Act that is required to be defined in the regulations;

(n) prescribing any matter required or authorized by this Act to be prescribed by regulation.

* * *

(proposed Act)

73 The Lieutenant Governor in Council may make regulations

(a) prescribing the kinds of goods the leases of which are not within the scope of the Act,

(b) prescribing the duties of the Registrar,

(c) prescribing the location and hours for the offices of the Registrar or any of them,

(d) respecting the Registry, including the transition from any prior registry system to the system established by this Act,

(e) requiring the payment of fees and prescribing the amount of the fees and the manner of payment of them,

(f) prescribing the time, place and all other matters pertaining to the registration of documents that may or are required to be registered under this Act,

(g) prescribing

(i) the form, content and manner of use of financing statements and financing change statements to be used to register security interest under this Act,

(ii) the form, content and manner of use of notices referred to in this Act, including notices registered under section 49 in a land titles office,

(iii) the manner in which collateral, including proceeds collateral, is to be described in financing statements and prescribing what kinds of goods may be described in part by serial number and what kinds of goods must be described in part by serial number,

(h) prescribing the time, place and all other matters pertaining to searches of the Registry and the method of disclosure of registered information including the form of a search result,

(i) requiring or permitting the use of statements to confirm the registration of information on financing statements and financing change statements,

(j) permitting the Registrar to amend a registration that contains an error caused by the act of the Registrar or registry employees and prescribing the limits of the amendments,

(k) prescribing abbreviations, expansions or symbols that may be used in a financing statement, financing change statement or other form, notice or document used in connection with the registration of security interests or the disclosure of information in the Registry,

(l) prescribing the length of time during which a registration is to be effective and the manner in which the period of time is to be indicated,

(m) prescribing the maximum amounts of compensation payable or recoverable under section 52 to 54,

(n) defining any word or expression used in this Act that is required to be defined for the purposes of the regulations,

(o) authorizing the Registrar to make arrangements providing for the deferred payment of fees and charges and prescribing conditions that must be met if the arrangements are to be made available or continue to be made available to particular persons,

(q) prescribing the amount of any charge to which a secured party or person named as a secured party in a financing statement is entitled under sections 18 and 64,

(r) prescribing the amount of damages payable by a secured party under section 65,

(s) prescribing any matter required or authorized by this Act to be prescribed by regulation.

(existing and proposed Act)

74 The Crown is bound by this Act.